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No. 10-

IN THE

Supreme Court of the United States

CHARLES JACKSON FRIEDLANDER,
Petitioner,

v.

UNITED STATES,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 2422(b) of 18 U.S.C. prohibits the use of the mail, or any facility of interstate commerce, to "knowingly persuade[ ], induce[ ], entice[ ], or coerce[ ] any individual who has not attained the age of 18 years, to engage in ... any sexual activity for which any person can be charged with a criminal offense," or to attempt to do so. The federal courts of appeals are substantially and admittedly divided about the admissibility of expert psychiatric testimony in such cases. This division of authority is critically important, because such testimony is often central to the accurate determination of the most important issue before the jury: what the defendant intended during sexually oriented conversations with other adults on the Internet. This case presents two intertwined aspects of the confusion in the courts of appeals:

1. Whether expert psychiatric testimony regarding whether a defendant has a sexual interest in children, including whether a defendant meets the clinical definition of pedophilia, is relevant and admissible in prosecutions under § 2422(b).

2. Whether expert testimony regarding the culture of fantasy speech on the Internet is competent and admissible in prosecutions under § 2422(b).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	4
A. The Offense Conduct	4
B. Proposed Expert Testimony	6
C. Proceedings Below	9
REASONS FOR GRANTING THE PETITION	12
I. REVIEW IS WARRANTED TO RESOLVE PERSISTENT CONFUSION CONCERNING THE ADMISSIBILITY OF EXPERT TESTIMONY IN PROSECUTIONS UNDER 18 U.S.C. § 2422(b)	14
A. The Decision Below Exacerbates A Conflict Over The Relevance Of Expert Psychiatric Testimony Concerning A Defendant's Sexual Interest In Children, Including Clinical Diagnoses Of Pedophilia Or Related Disorders, In Prosecutions Under § 2422(b)	14
B. The Decision Below Creates A Conflict With The Second Circuit Concerning The Reliability Of Expert Testimony Regarding Fantasy Speech On The Internet	22

TABLE OF CONTENTS—continued

Page

C. Review Is Warranted Because Of The Importance Of Expert Testimony In Prosecutions Under 18 U.S.C. § 2422(b).. 26

CONCLUSION 29

APPENDICES

APPENDIX A: *United States* v. *Friedlander*, Nos. 09-11354, -13811, 2010 WL 3447878 (11th Cir. Sept. 3, 2010) 1a

APPENDIX B: *United States* v. *Friedlander*, No. 8:08-CR-318-T-27TGW (M.D. Fla. July 22, 2009)..... 8a

APPENDIX C: *United States* v. *Friedlander*, No. 8:08-CR-318-T-27TGW (M.D. Fla. Nov. 17, 2008) (*Daubert* hearing) 21a

APPENDIX D: *United States* v. *Friedlander*, Nos. 09-11354, -13811 (11th Cir. Oct. 28, 2010) (order denying rehearing) 44a

APPENDIX E: Exhibit, Amended Motion to Exclude Defense Expert, *United States* v. *Friedlander*, No. 8:08-CR-318-T-27TGW (M.D. Fla. filed Nov. 14, 2008) (Dkt. 86-1) 45a

TABLE OF AUTHORITIES

CASES Page

Daubert v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) 7, 20
Kumho Tire Co. v. *Carmichael*, 526 U.S. 137 (1999) 25
United States v. *Curtin*, 588 F.3d 993 (9th Cir. 2009) 25
United States v. *Evans*, 272 F.3d 1069 (8th Cir. 2001) 23
United States v. *Friedlander*, No. 8:08-CR-318-T-27TGW, 2009 WL 320861 (M.D. Fla. Feb. 6, 2009) 10
United States v. *Gladish*, 536 F.3d 646 (7th Cir. 2008) 17, 18, 19
United States v. *Godwin*, No. 0-16015, 2010 U.S. App. LEXIS 20927 (11th Cir. Oct. 7, 2010) 15
United States v. *Goetzke*, 494 F.3d 1231 (9th Cir. 2007) 27
United States v. *Hankey*, 203 F.3d 1160 (9th Cir. 2000) 23
United States v. *Hofus*, 598 F.3d 1171 (9th Cir.), *cert. denied*, 131 S. Ct. 364 (2010) ..... *passim*
United States v. *Joseph*, 542 F.3d 13 (2d Cir. 2008) 22, 23, 27
United States v. *Long*, 328 F.3d 655 (D.C. Cir. 2003) 27
United States v. *Mitchell*, 353 F.3d 552 (7th Cir. 2003) 4
United States v. *Ross*, No. 06-00637, 2008 WL 4963045 (N.D. Cal. Nov. 19, 2008) 25

TABLE OF AUTHORITIES—continued

Page

United States v. *Tocco*, 200 F.3d 401 (6th Cir. 2000) 23

United States v. *Watson*, 260 F.3d 301 (3d Cir. 2001) 23

Young v. *Murphy*, 615 F.3d 59 (1st Cir. 2010) 7

STATUTES

18 U.S.C. § 2422(b) 1, 17

§ 3731 28

RULES

Fed. R. Evid. 401 ..... 2, 17, 20

702 ..... 2, 24

PETITION FOR A WRIT OF CERTIORARI

Dr. Charles Jackson Friedlander respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the district court excluding the testimony of Dr. Berlin is reproduced in the appendix to this petition ("Pet. App.") at 33a, 40a-43a. The judgment of conviction is reproduced at Pet. App. 8a-20a. The opinion of the court of appeals affirming the conviction is unpublished; it is available at 2010 WL 3447878 (11th Cir. Sept. 3, 2010), and reproduced at Pet. App. 1a-7a. The court of appeals' order denying rehearing is reproduced at Pet. App. 44a.

JURISDICTION

The Eleventh Circuit entered judgment on September 3, 2010. Pet. App. 1a. A timely petition for rehearing was denied on October 28, 2010. Pet. App. 44a. On January 13, 2011, Justice Thomas granted an extension of time to and including February 25, 2011 to file a petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

18 U.S.C. §2422(b) provides:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person

> can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

Federal Rule of Evidence 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

INTRODUCTION

This case presents important and recurring questions about whether and when expert testimony—particularly, expert psychiatric testimony—is admissible in criminal prosecutions arising out of sexual discussions relating to children on the Internet. Prosecutions under § 2422(b) often allege the attempted enticement of a "child" with or about whom sexual discussions were had in Internet chats with individuals who are actually undercover law-enforcement officers. These cases commonly turn on questions of the defendant's mental state and intent as reflected

in such discussions. Expert psychiatric testimony is often critical to distinguishing between the true sexual predator targeting children and the harmless fetishist or fabulist who is using the apparent anonymity of the Internet to indulge, with whatever degree of seriousness, sexual fantasies upon which he would not act.

There exists persistent confusion among the courts of appeals, however, about whether psychiatric experts may testify to whether a defendant's mental state indicates a genuine sexual interest in children, including whether a defendant meets the clinical definition of pedophilia or other related sexual disorders, and to the culture of sexual fantasy speech on the Internet. These questions have potentially dispositive impact on numerous prosecutions under § 2422(b), and the Court should grant review to resolve the current confusion on this important question.

In the decision below, the Eleventh Circuit upheld the exclusion of what would have been the most important exculpatory testimony in the prosecution of Petitioner Dr. Charles Friedlander, who is an 80-year-old man with no history of sexual contact with children or any other criminal behavior. Specifically, the court excluded expert psychiatric testimony that Dr. Friedlander is not a pedophile, and that there is a widespread phenomenon of anonymous, sexually themed fantasy speech on the Internet. This Court should grant the petition to clarify the rules governing the admissibility of such testimony in cases of alleged child enticement under 18 U.S.C. § 2422(b), and to resolve the division of authority among the lower courts that currently exists on this important question. This Court should make clear that the Federal Rules of Evidence do not prevent juries from learning

information critical to rendering fair and accurate verdicts in cases of this kind.

STATEMENT OF THE CASE

A. The Offense Conduct.

Dr. Charles Friedlander is an 80-year-old retired mental health and guidance counselor, who has never married or had children. Dkt. 244, at 9, 20, 24, 35; Dkt. 301, at 114. From his home in Ft. Myers, Florida, Dr. Friedlander, who was then living alone, spent large amounts of time on the Internet—sometimes upwards of 15 hours a day. Dkt. 301, at 176-181.

In June 2008, Dr. Friedlander began interacting in an AOL chat room[1] called "Strict Parents" using the screen name[2] "Captoes" with an individual using the screen name "Strictdad7." Dkt. 308, at 221-222; Dkt. 300, at 22. Unbeknownst to Dr. Friedlander, Strictdad7 was in reality undercover Corporal Kurt Romanosky of the Pinellas County Sheriff's Department.[3] Dkt. 308, at 221-222. Over the next

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[1] "A chat room is a place on the world wide web where Internet users with common interests can sign on to communicate in real time. Generally, when users enter a chat room they see a list of other persons (usually known by pseudonyms) who have also signed on to the chat room site. To 'chat,' users type a message which can be seen almost immediately by all of the other persons 'present' in the chat room. They may, in turn, respond." *United States* v. *Mitchell*, 353 F.3d 552, 554 n.2 (7th Cir. 2003).

[2] "A screen name is an appellation used to identify oneself in a chat room or when sending instant messages to another computer user. Although it can be the user's real name, it is more often a pseudonym." *Mitchell*, 353 F.3d at 554 n.3.

[3] Also unbeknownst to Dr. Friedlander, as well as to Corporal Romanosky at the time, Corporal Romanosky had previously chatted under a different screen name with "Captoes" in 2005. Dkt. 308, at 224.

six weeks, Captoes and Strictdad7 chatted over the Internet multiple times, discussing corporal punishment and sexual abuse of children. Dkt. 300, at 28-174. During these chats, Captoes invented fictitious grandchildren of friends and a fictitious, now-grown son of his own. Captoes told Strictdad7 that he had abused the non-existent children and talked about implements he had used in doing so. *Id.* at 23-24. Captoes expressed interest in meeting Strictdad7 in person and proposed that they meet for lunch. *Id.* at 60.

Eventually, Strictdad7 (Romanosky) offered to introduce Captoes (Friedlander) to a group of parents who shared an interest in physical and sexual abuse, and offered to permit Captoes to perform corporal punishment on his sons. *Id.* at 38-39. Like the children invented by Captoes, Strictdad7's sons also were imaginary. Strictdad7 and Captoes agreed that, when they met, Captoes should bring implements for corporal punishment. *Id.* at 55. Strictdad7 also initiated discussion about whether Captoes would be interested in sexual activity with the boys, and the two discussed possible sexual acts. *Id.* at 84, 87-88.

Strictdad7 and Captoes later spoke by telephone and arranged to meet at a restaurant in St. Petersburg, Florida before the meeting of Strictdad7's parents' group. *Id.* at 104-112. Several days before the planned meeting, Dr. Friedlander, who has long suffered from diabetes and prostate problems, had a doctor's appointment at which he received drug samples and a prescription for his repeated complaint about the related side-effect of erectile dysfunction. Dkt. 301, at 236-237. On July 21, 2008, Dr. Friedlander drove from his home in Ft. Myers to the Cracker Barrel in St. Petersburg. Corporal Romanosky met Dr. Friedlander in the parking lot and asked him if he

had brought the implements they discussed. Dkt. 300, at 175, 184-186. When Dr. Friedlander confirmed that he had, he was placed under arrest. *Id.* at 187-190.

During the station-house interrogation by Corporal Romanosky, Dr. Friedlander explained that he had no sexual interest in children (*id.* at 261), and stated repeatedly that his Internet chats were not based in reality: His conversations with Strictdad7 were "fantasy" (Dkt. 301, at 7), and the stories he had told about abusing children were "a lot of crap" (*id.* at 34, 35).

A subsequent search of Dr. Friedlander's home and computer established that he possessed no child pornography, and no toys or other items of interest to children. *Id.* at 231. The ensuing investigation revealed no evidence of any prior sexual contact with actual children. *Id.* at 130-131. Indeed, Corporal Romanosky himself testified that he did not believe the children Dr. Friedlander had mentioned in the chats were real, nor that Dr. Friedlander had actually done the things he had described. *Id.* at 112, 121, 133-134. Ultimately, however, the United States Attorney's Office for the Middle District of Florida charged Dr. Friedlander with one count of attempting to entice a child to engage in illegal sexual acts under 18 U.S.C. § 2422(b).

B. Proposed Expert Testimony.

To defend himself against this charge, Dr. Friedlander retained Dr. Fred Berlin, one of the country's leading experts on sexual disorders. Dr. Berlin holds an M.D. and a Ph.D. in psychology, and is a board-certified psychiatrist, an associate professor at Johns Hopkins University School of Medicine, and an attending physician at Johns Hopkins Hospital. Pet.

App. 45a. He directs a sexual disorders treatment program that has been designated as a National Resource Site by the U.S. Department of Justice. *Id.* at 46a; Dkt. 248, at 4. Dr. Berlin has served on the sexual disorders subcommittee for the third revision of the Diagnostic and Statistical Manual of Mental Disorders (DSM), "the authoritative reference used in diagnosing mental disorders," *Young* v. *Murphy*, 615 F.3d 59, 61 n.1 (1st Cir. 2010). Pet. App. 46a. Pertinent here, he has published numerous papers, including on pedophilia, sexual sadism, and Internet sexuality. Dkt. 248, at 5-6. And he has been invited to participate in a White House conference on child sexual abuse, and to address U.S. Senate subcommittees, colleges of judges in several states, and FBI and Justice Department symposia. Pet. App. 46a.

In connection with Dr. Friedlander's case, Dr. Berlin examined Dr. Friedlander. He then prepared and submitted a report and proffered testimony to the court during a *Daubert*[4] hearing, on several different topics: (1) the clinical definitions of pedophilia and sexual sadism (Pet. App. 22a-25a); (2) his diagnosis that Dr. Friedlander did not exhibit the symptoms of either disorder (*id.* at 23a-24a, 32a, 53a-57a); (3) the prevalence and nature of fantasy chat on the Internet (*id.* at 25a-27a); and (4) his professional opinion that Dr. Friedlander's interactions with Corporal Romanosky reflected mere fantasy (*id.* at 26a-30a, 51a-52a).

In reaching his diagnosis that Dr. Friedlander is not a pedophile, Dr. Berlin pointed to the fact that Dr. Friedlander possessed no child pornography, and

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[4] *See Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

to the complete absence of evidence of actual sexual activity with any real child in the course of Dr. Friedlander's 78 years. Pet. App. 24a, 56a-57a. Dr. Berlin explained that "[t]here simply isn't sufficient evidence here that this is a man who has either acted in a way where he's been repeatedly involved with children or involved with children at all, for that matter, in terms of actual sexual contact." *Id.* at 24a. Possessing no pornography whatsoever, as Dr. Friedlander did not, is "unusual for someone who's using a computer and has pedophilia." *Id.* In addition, Dr. Friedlander had "made no attempt to directly contact a child and induce a child into sexual activity." *Id.* Ultimately, Dr. Berlin concluded, Dr. Friedlander is not a pedophile: "Again, he's 78 years old, and there's no evidence of a prior criminal record or any prior acts involving children. So putting it altogether, I simply cannot find enough evidence to suggest that he would qualify for that condition." *Id.* This was relevant to Dr. Friedlander's defense because, as Dr. Berlin explained, "someone who has [pedophilia] would be more likely than someone who doesn't to try to approach a child in a sexual way." *Id.* at 32a.

Dr. Berlin also proffered his expert opinions about Internet fantasy speech. In particular, he described two ways in which such speech occurs. The first "has to do with simulated role-playing." Pet. App. 26a. Dr. Berlin elaborated: "It's clear now that many people on the Internet pretend to be someone whom they're not. Many people have sort of an Internet persona ... in which they act out fantasies. ... There's clear evidence in this case ... that that was occurring." *Id.* In addition, fantasy speech occurs as "an aspect of the Internet to the extent that people who in a sense feel like they in the privacy of their home can explore their fantasy lives." *Id.* For instance, they

may visit web sites that focus on subjects they would not act on or publicly discuss. *Id.* at 26a-27a.

Regarding Dr. Friedlander's trip to meet "Strictdad7," Dr. Berlin provided his "professional opinion that [Dr. Friedlander] had been quite lonely at that time, and that he had been looking for an affiliation with someone with whom he had been sharing, what he had believed, had been common fantasies over the Internet." Pet. App. 55a. Dr. Berlin emphasized Dr. Friedlander's desire to develop a relationship with Strictdad7, explaining that "over time[,] Dr. Friedlander had come to feel an emotional bond, and an affiliation with, the undercover agent with whom (from Dr. Friedlander's perspective) he had been sharing his fantasy interests." *Id.* at 58a. Thus, "[i]n order to ensure that the desired meeting with this other man would actually occur, Dr. Friedlander had felt the need to continue maintaining his fantasy persona." *Id.* In Dr. Berlin's professional judgment, Dr. Friedlander's "descriptions about what he had intended to do with the agent's non-existent children had been no more about real-life intent than had been his descriptions about what he had already been doing with his own non-existent son." *Id.* "In point-of-fact, in order to try to ensure that he would be accepted as a 'friend,' he had even taken the time (with the agent's implicit encouragement) to bring with him the very same straps and whips with which to beat the agent's non-existent children that he had previously used to beat his own non-existent son." *Id.*

C. Proceedings Below.

The crux of the government's accusation against Dr. Friedlander was that he intended to try to entice

a child to engage in illegal sexual acts; the heart of his defense was that he had no such intent because he had no actual sexual interest in children and was merely engaging in fantasy Internet chat with another adult. The testimony of Dr. Berlin was central to this defense. It was directly probative of Dr. Friedlander's sexual proclivities, and therefore of his actual intent in undertaking child-related sexual communications with Corporal Romanosky. Indeed, Dr. Berlin's testimony was almost certainly the most significant exculpatory testimony in the case.

The district court, however, did not permit the jury to hear Dr. Berlin's testimony or evaluate his expert opinions. As previously noted, the testimony summarized above was proffered to the court prior to Dr. Friedlander's first trial,[5] at which the district court considered both it and Dr. Berlin's expert report. The district court determined that Dr. Berlin was "[c]learly" qualified as an expert in forensic psychiatry and "exerts extraordinary professional experience." Dkt. 248, at 76. Yet the court refused to allow Dr. Berlin to testify whether Dr. Friedlander met the clinical definition of pedophilia.

The court excluded the testimony on the ground that it is irrelevant to the jury's determination whether he attempted to induce a child to have unlawful sexual contact with him. According to the district court, because not being a pedophile is "not a defense under [the insanity defense provision,

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[5] This petition arises out of Dr. Friedlander's second trial. The first resulted in a mistrial after the prosecutor improperly attempted to discredit a defense expert by erroneously asserting that he had relied upon an outdated version of the Diagnostic and Statistical Manual of Mental Disorders. *See United States v. Friedlander*, No. 8:08-CR-318-T-27TGW, 2009 WL 320861 (M.D. Fla. Feb. 6, 2009).

18 U.S.C.] Section 17," it was "not relevant." Pet. App. 41a-42a. Moreover, the court asserted, "whether or not this defendant is or is not a pedophile ... is not relevant to the ultimate question of whether he violated the statute." *Id.* at 42a; see *id.* ("[Y]ou don't have to be a pedophile to violate the statute, nor do you have to be a sadomasochist to violate the statute.").

The court also refused to allow Dr. Berlin to testify regarding sexual fantasy chat on the Internet, reasoning that "[t]here is no scientific methodology or experience based methodology making his opinions about Internet fantasizing reliable." Pet. App. 37a. The court also found that Dr. Berlin's testimony would not assist the jury because the jury "is perfectly capable of determining whether or not this defendant was fantasizing or not when he engaged in the chats that he apparently did." *Id.* at 40a. In addition, the court said, "any testimony concerning whether this defendant was fantasizing or intended this to be reality goes to the ultimate determination of fact the jury will be asked to draw and is, therefore, inadmissible under 704(b)." *Id.* at 41a. But the asserted absence of reliability was the "lynchpin" of the court's decision to exclude the testimony concerning fantasy speech: "Dr. Berlin identifies no scientific methodology, testing, or anything that I can comfortably premise a finding of reliability on." *Id.* at 40a.

In response to motions before Dr. Friedlander's second trial, the district court ruled that its prior decision concerning Dr. Berlin's testimony would continue to apply. Dkt. 228, at 3. As a result, the defense did not call Dr. Berlin as a witness. Indeed, it rested without putting on a case and renewed all its prior motions and objections. Dkt. 302, at 120-121.

The jury found Dr. Friedlander guilty, and the district court sentenced him to 360 months' imprisonment—given Dr. Friedlander's advanced age, effectively a sentence of life imprisonment. Pet. App. 10a; Dkt. 303, at 41-42; Dkt. 304, at 85.

On appeal, the Eleventh Circuit affirmed the district court's exclusion of the expert testimony about fantasy on the Internet. It found "no error" in the district court's conclusion "that the expert's opinion was unreliable as it was not based on the DSM IV or quantifiable scientific methodology." Pet. App. 5a. Regarding the exclusion of Dr. Berlin's diagnosis that Dr. Friedlander is not a pedophile, the Eleventh Circuit erroneously held that Dr. Friedlander "did not preserve his claim," *id.*, and that the district court did not commit plain error in excluding the expert testimony. *Id.* at 6a. Having also rejected Dr. Friedlander's other challenges, the Eleventh Circuit affirmed his conviction and sentence. *Id.* at 1a-7a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to provide much-needed clarity regarding the admissibility of expert psychiatric testimony in child enticement prosecutions under § 2422(b). The lower federal courts have taken radically different approaches, and the multiple opinions addressing these issues reflect substantial confusion.

The Eleventh Circuit flatly prohibits expert psychiatrists from testifying about whether defendants suffer from mental conditions or psychiatric disorders, including pedophilia, that would indicate a genuine sexual interest in children, or about the culture of sexual fantasy discussions on the Internet. Other courts permit such testimony in varying degrees,

sometimes allowing testimony about mental state or clinical diagnosis; sometimes allowing testimony about the likely intent or conduct resulting from that mental state or diagnosis; and sometimes permitting testimony about fantasy discussion on the Internet. With regard to psychiatric evaluations of defendants, the Eleventh Circuit's decision deepens an acknowledged conflict between the Ninth and Seventh Circuits. With regard to testimony about sexual fantasy chat on the Internet, the decision below creates a conflict with the Second Circuit. The Eleventh Circuit is wrong on both issues.

Review is particularly warranted because this evidence is potentially outcome-determinative in child enticement cases, which typically result from online sting operations and carry with them higher than normal risks of punishing ugly but non-criminal speech among consenting adults. Cases like this one require juries to decide whether a defendant actually intended to entice a child into sexual activity—often (as here) when no actual child was ever involved in the underlying events. Expert psychiatric testimony is essential to making that decision accurately. The conflicting approaches taken by the lower courts mean that similarly situated defendants in different circuits have different means and opportunities to defend themselves, and face disparate probabilities of losing their liberty based on sexually themed Internet speech depending upon the jurisdiction in which they are prosecuted. Given the serious consequences of conviction—a mandatory minimum penalty of 10 years, and the likelihood of life in prison—this Court's review is warranted to ensure a fair and nationally uniform approach in child enticement prosecutions under 18 U.SC. § 2422(b).

I. REVIEW IS WARRANTED TO RESOLVE PERSISTENT CONFUSION CONCERNING THE ADMISSIBILITY OF EXPERT TESTIMONY IN PROSECUTIONS UNDER 18 U.S.C. § 2422(b).

A. The Decision Below Exacerbates A Conflict Over The Relevance Of Expert Psychiatric Testimony Concerning A Defendant's Sexual Interest In Children, Including Clinical Diagnoses Of Pedophilia Or Related Disorders, In Prosecutions Under § 2422(b).

In assessing whether a defendant accused of violating § 2422(b) actually intended to entice a child into sexual acts, it seems self-evident that a jury would be entitled to know whether the defendant is a pedophile, or otherwise has a mental or psychiatric condition that reflects—or makes unlikely—a genuine sexual interest in children. Yet the *three* courts of appeals to address the relevance and admissibility of expert psychiatric testimony concerning a defendant's mental state or psychiatric condition—including, as here, testimony that a defendant does not meet the clinical definition of pedophilia—have expressed *four* different positions. Some of these opinions disagree entirely; some agree in part; and some purport to agree when in fact they do not. In short, confusion reigns. Further percolation could not resolve this disarray, nor better position the issue for this Court's review.

1.a. The Eleventh Circuit has embraced the most extreme position. In the Eleventh Circuit, the jury in attempted child enticement cases under 18 U.S.C. § 2422(b) cannot hear any expert psychiatric testimony about the defendant's psychiatric condition (here, pedophilia or lack thereof). In the decision below, the

Eleventh Circuit upheld the exclusion of the testimony of psychiatric expert Dr. Berlin that Dr. Friedlander does not meet the clinical definition of pedophilia. Pet. App. 5a-6a. The district court found that such testimony is *per se* irrelevant to whether the defendant intends to entice a child to engage in sexual acts, reasoning that "whether or not this defendant is or is not a pedophile ... is not relevant to the ultimate question of whether he violated the statute." *Id.* at 42a; see *id.* ("you don't have to be a pedophile to violate the statute").

The Eleventh Circuit recently reaffirmed this categorical view in *United States* v. *Godwin*, No. 09-16015, 2010 U.S. App. LEXIS 20927 (11th Cir. Oct. 7, 2010) (per curiam). In *Godwin*, the court of appeals held that the district court did not abuse its discretion in preventing a psychiatric expert from testifying that the defendant "was not a pedophile or a sexual predator." *Id.* at *8. The Eleventh Circuit explained: "The issue of whether [the defendant] was a pedophile or a predator was not relevant to the elements of § 2422(b), to the entrapment defense, or to rebut an argument of the Government." *Id.* at *8-9.

b. The Ninth Circuit takes a different approach. That court *does* permit testimony about a defendant's clinical diagnosis but *does not* permit testimony about whether that condition affects the likelihood that the defendant actually intended to commit the forbidden act. See *United States* v. *Hofus*, 598 F.3d 1171 (9th Cir.), *cert. denied*, 131 S. Ct. 364 (2010). In *Hofus*, the defendant's expert proffered testimony about Hofus's clinical diagnosis, *id.* at 1177—there, that he was neither a hebophile nor a pedophile[6]—and "that

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[6] Hebophilia is "an abnormal sexual interest in youthful women with some secondary sexual characteristics," whereas pedo-

it was unlikely Hofus would act on the intentions [he had] expressed," *id.* at 1178. The court held that "expert testimony as to whether [the defendant] was likely to actually have sex with [the minor] [is] irrelevant to whether [the defendant] violated § 2422." *Id.* The Ninth Circuit emphasized that the required intent under 18 U.S.C. § 2422(b) is the intent to entice or persuade a minor, not the intent to commit the underlying sexual act. Thus, it reasoned, testimony that a defendant was unlikely to actually have sex with the minor "does not make it more likely or not that he attempted to *entice* or *persuade* her to agree to an illegal sex act." *Id.* at 1179.

The court indicated, however, that it would permit testimony about clinical diagnosis. The district court had permitted Hofus's expert to testify that he was not a hebophile; that ruling went unchallenged on appeal. Moreover, the Ninth Circuit's disposition of the related challenge to the exclusion of testimony concerning pedophilia confirmed the Ninth Circuit's basic view that clinical diagnosis testimony is generally admissible as long as the diagnosis is relevant to the facts of the case. The district court had excluded testimony that Hofus was not a pedophile, "because the case involved only post-pubescent girls." *Id.* at 1177. The Ninth Circuit upheld this ruling for the same reason. Thus, in the same way the testimony regarding hebophilia was admitted, testimony regarding pedophilia would have been relevant and admissible if the case had involved prepubescent children.

c. *Hofus*, however, was not unanimous; Judge Noonan dissented. In so doing, he staked out yet a third

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philia is "an abnormal sexual interest in prepubescent children." *Hofus*, 598 F.3d at 1177.

position. For him, the critical distinction was between evidence concerning "the defendant's intent to commit the crime that is charged," and "the existence or absence of the defendant's intent to commit the uncharged crime of attempting to have sexual intercourse with a minor." *Id.* at 1180.[7] Testimony as to the former "is forbidden," he would have held, as testimony on the ultimate issue of intent to commit the charged crime. *Id.* "But," he explained, testimony about intent to commit the uncharged crime "was highly relevant." *Id.* Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. And, as Judge Noonan explained,

> If the defendant did not intend to have intercourse with the minor, he was unlikely to be attempting to persuade her to have intercourse. What the expert would testify to is a circumstance, a circumstance that makes it considerably less likely that the crime that has been charged actually took place.

598 F.3d at 1180.

d. In *United States* v. *Gladish*, the Seventh Circuit embraced still another position. 536 F.3d 646 (7th Cir. 2008). *Gladish* predated *Hofus*, and the Ninth Circuit in *Hofus* evaluated and expressly rejected *Gladish*, thus creating an acknowledged split of authority on this issue. See *Hofus*, 598 F.3d at 1179

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[7] This "uncharged crime" is relevant because § 2422(b) contains as an element the enticement "to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense," 18 U.S.C. § 2422(b).

("we do not find the *Gladish* analysis particularly persuasive").[8]

In *Gladish*, as here, the defendant was charged with attempted violation of 18 U.S.C. § 2422(b) after communicating in a chat room with an undercover agent. And also as here, the defendant's expert in *Gladish* submitted a report concerning the defendant's psychiatric condition (there, a character pathology), and the court excluded the expert from testifying. 536 F.3d at 650. Judge Posner wrote for a unanimous panel that the expert should have been permitted to testify. On the one hand, the court explained, "[t]he psychologist could not have been permitted to testify that the defendant did not intend to have sex with [the minor]." *Id.* This analysis conflicts directly with Judge Noonan's, who would permit testimony concerning "the existence or absence of the defendant's intent to commit the uncharged crime of attempting to have sexual intercourse with a minor." *Hofus*, 598 F.3d at 1180 (Noonan, J., dissenting).

Important here, however, the Seventh Circuit concluded that the expert "could have testified that it was unlikely, *given the defendant's psychology*, that he would act on his intent." *Gladish*, 536 F.3d at 650-51 (emphasis added). In this respect, Judge Posner's analysis is similar to Judge Noonan's: both would permit testimony about the defendant's psychiatric condition, short of testimony regarding what they consider to be the ultimate issue of intent to commit the crime charged, that would inform the jury about a "circumstance that makes it considerably less

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[8] The Ninth Circuit also dismissed the discussion in *Gladish* as "of course, dicta." *Hofus*, 598 F.3d at 1179. *Gladish* itself disagrees—it explained that its discussion "bears on our analysis of the attempt issue." *Gladish*, 536 F.3d at 650.

likely that the crime that has been charged actually took place." *Hofus*, 598 F.3d at 1180 (Noonan, J., dissenting).

That is precisely the testimony that Dr. Berlin proffered here. He would have testified about "the defendant's psychology," *Gladish*, 536 F.3d at 650—specifically, his clinical diagnosis that Dr. Friedlander is not a pedophile, see *supra* at 7-8—which would have made it considerably less likely that Dr. Friedlander had any actual interest in sexual contact with children, making it correspondingly unlikely that he would have attempted to entice them into such contact. As Dr. Berlin himself explained during the *Daubert* hearing, "someone who has [pedophilia] would be more likely than someone who doesn't to try to approach a child in a sexual way." Pet. App. 32a.

Simply put, vital aspects of the testimony that Dr. Berlin proffered and the district court here rejected would have been admitted if this prosecution had occurred in the Seventh or the Ninth Circuit. Such inconsistency is intolerable, particularly given the critical importance of this testimony to the fair and accurate adjudication of the charges. As Judge Noonan explained, "[i]t was vital to the defense to have the expert's testimony before the jury. To deny the defense the right to present it was to deny the right of the accused to present a defense." *Hofus*, 598 F.3d at 1181.

2. Judge Noonan's words could have been written for Dr. Friedlander's case, which illustrates the devastating impact of the erroneous rule adopted by the district court and the Eleventh Circuit in the decision below.

Federal Rule of Evidence 401 establishes that evidence is relevant if it has "any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401; see *Daubert* v, *Merrill Dow Pharms., Inc.*, 509 U.S. 579, 591-92 (1993) (noting that Federal Rule of Evidence 702's requirement that testimony "assist the trier of fact to understand the evidence or to determine a fact in issue" "goes primarily to relevance" and explaining that "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility") (internal quotation marks omitted). As this Court recognized in *Daubert*, the "basic standard of relevance" under the Federal Rules of Evidence "is a liberal one." 509 U.S. at 587.

Under this "liberal" standard, Dr. Berlin's diagnosis that Dr. Friedlander is not a pedophile is "highly relevant," *Hofus*, 598 F.3d at 1180 (Noonan, J. dissenting)—the diagnosis was a "circumstance that makes it considerably less likely that the crime charged actually took place." *Id.* Without that testimony, Dr. Friedlander was unable to counter persuasively the government's argument that he engaged in the chats with Strictdad7 and drove to St. Petersburg with the actual intent to engage in sexual abuse of Strictdad7's fictitious sons, rather than simply to cultivate an online friendship with another adult through shared fantasy talk. Deprived of the ability to present this vital testimony, Dr. Friedlander did not call the expert at his second trial. Indeed, his defense was so handicapped by the district court's ruling that he presented no defense at all.

The Eleventh Circuit's ruling that Dr. Friedlander waived this argument, and the court's resulting review of this evidentiary issue under a plain error standard, badly confused two different aspects of the

trial. Pet. App. 5a ("Friedlander did not preserve his claim about the testimony on the clinical definitions of sadism and pedophilia."). As the Eleventh Circuit noted, during the prosecution's case-in-chief Corporal Romanosky presented testimony about sexual sadism, Dkt. 308, at 230-231, at which point the defense moved to expand the scope of Dr. Berlin's testimony to include whether Dr. Friedlander is a sexual sadist, Dkt. 301, at 227, 242-243. The district court reserved ruling on *that* motion until the defense called Dr. Berlin, *id.* at 247-248, which ultimately never occurred, Pet. App. 5a-6a. Important here, however, the detective's testimony about sexual sadism provided no opportunity for the court to reconsider its prior ruling excluding Dr. Berlin's testimony about whether Dr. Friedlander is a pedophile. That ruling carried over from the first trial, Dkt. 228, at 3; was not open for reconsideration at the second trial; and was expressly preserved when Dr. Friedlander renewed all of his prior motions and objections at the close of trial, Dkt. 302, at 121. The record here contains the expert's report and the transcript of the full *Daubert* hearing, including the district court's relevancy ruling, and so affords this Court ample basis to review the decision below, and to resolve the division of authority on this important question.

This division of authority should not be permitted to persist. In addition to the imperative of resolving the analytical confusion in the courts of appeals, permitting juries in some circuits but not others to hear testimony about whether a defendant accused of attempting to entice children has a psychiatric condition that makes such an intention more or less likely violates fundamental fairness. As this case demonstrates, such testimony is likely to be critical to the defense, if not wholly outcome-determinative. Had

Dr. Friedlander been tried in the Seventh Circuit or the Ninth, he would have had a far better chance of convincing a jury of the truth of his defense—that he never had the slightest intention of actually inducing a minor to engage in sexual activity. For Dr. Friedlander, and others indicted in the Eleventh Circuit, this happenstance may well mean the difference between freedom and life in prison.

B. The Decision Below Creates A Conflict With The Second Circuit Concerning The Reliability Of Expert Testimony Regarding Fantasy Speech On The Internet.

1. Further demonstrating the general confusion among the courts of appeals regarding the appropriate scope and role of expert testimony in child enticement cases, the Eleventh Circuit's ruling below implicates a second area of disagreement: whether a jury's decision will be aided by expert testimony concerning the nature and culture of sexual fantasy speech on the Internet.

The Eleventh Circuit affirmed the district court's exclusion of such testimony in Dr. Friedlander's case, finding "no error" in the district court's conclusion "that the expert's opinion was unreliable as it was not based on the [Diagnostic and Statistical Manual of Mental Disorders] or quantifiable scientific methodology." Pet. App. 5a. By requiring such testimony to be based on a diagnosis contained in the Diagnostic and Statistical Manual of Mental Disorders or on "quantifiable scientific methodology," the Eleventh Circuit adopted an overly stringent standard for the admission of such testimony, and created a conflict with the Second Circuit's opinion in *United States* v. *Joseph*, 542 F.3d 13, 21-22 (2d Cir. 2008).

In *Joseph*, the Second Circuit addressed proposed expert testimony about "role-playing in the context of sexually explicit conversations on the Internet"—in particular, the "distinct culture of the Internet in which one can become a 'fantasy character[ ]'" and "the realities and motivations of online role-playing via chatrooms and email." *Id.* at 21. The Second Circuit noted that the expert's "field of study and experience qualified him to offer relevant testimony," stressing that "[s]ocial science research, theories and opinions cannot have the exactness of hard science methodologies," and "expert testimony need not be based on statistical analysis in order to be probative." *Id.* (internal quotation marks omitted). Moreover, the Second Circuit pointed out that "peer review, publication, potential error rate, etc. are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *Id.* (internal quotation marks and alteration omitted). "In such cases, the place to quibble with an expert's academic training is on cross-examination and goes to his testimony's weight not its admissibility." *Id.* (internal quotation marks and alteration omitted).

Expert testimony about the culture of sexually themed fantasy speech on the Internet is much like expert testimony on other cultures that are beyond the ken of the average juror, which courts routinely find reliable based on an expert's experience. See, *e.g.*, *United States* v. *Watson*, 260 F.3d 301, 307-08 (3d Cir. 2001) (operations of narcotics dealers); *United States* v. *Evans*, 272 F.3d 1069, 1094 (8th Cir. 2001) (relationships between pimps and prostitutes); *United States* v. *Hankey*, 203 F.3d 1160, 1167-70 (9th Cir. 2000) (gang culture); *United States* v. *Tocco*, 200

F.3d 401, 419 (6th Cir. 2000) (organized crime). The absence of "quantifiable scientific methodology" does not bar such expert testimony, and the Eleventh Circuit's decision to the contrary conflicts not only with the Second Circuit's correct ruling on this precise question in *Joseph* but also with this broader, well-established body of case law regarding the admissibility of expert descriptions, explanations, and opinions of cultural phenomena that are outside the normal experience of the average juror.

Here, there was no dispute about Dr. Berlin's "knowledge and experience." On the contrary, the district court specifically found that Dr. Berlin was "[c]learly" qualified, and "exerts extraordinary professional experience." Dkt. 248, at 76. Rather, the Eleventh Circuit affirmed the exclusion of the testimony based solely on the court's view that his testimony about the prevalence of sexual fantasy speech in certain subcultures on the Internet *must* be based on a "quantifiable scientific methodology" or the DSM in order even to be admissible. Pet. App. 5a. The conflict is clear and direct, and should not be permitted to persist.

2. The Second Circuit's approach is the correct one, and it should have been applied by the Eleventh Circuit here. It finds support in the Committee notes on the 2000 Amendments to Federal Rule of Evidence 702, which emphasize that "[n]othing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony." Fed. R. Evid. 702 advisory committee's note; see *id.* ("[T]he text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience."). That view is echoed in statements of this Court, which has ob-

served that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 156 (1999).

Consistent with the Second Circuit's approach and Rule 702, other district courts have allowed testimony about fantasy talk on the Internet in attempted enticement cases, see *Hofus*, 598 F.3d at 1177 (noting that the district court allowed a defense expert to testify "generally about fantasy-based communications"), and have looked to the expert's professional experience in determining the admissibility of the testimony, see *United States* v. *Curtin*, 588 F.3d 993, 997 (9th Cir. 2009) (noting that the district court allowed "a licensed marriage and family therapist" with "extensive experience with sex offenders" to testify regarding "Internet 'role playing fantasy'"). But cf. *United States* v. *Ross*, No. 06-00637, 2008 WL 4963045, at *8-11 (N.D. Cal. Nov. 19, 2008) (exclusion of testimony about the culture of the Internet was proper when computer expert was qualified to "explain how the Internet works" but there was "no basis to find him qualified on the cultural aspects of Internet chat rooms").

This Court's review is necessary to resolve this division of authority, and to harmonize the resulting conflict in approach among sister federal courts to the admission of this category of expert testimony in attempted child enticement cases under 18 U.S.C. § 2422(b). The Eleventh Circuit will not permit an expert to educate a jury about sexually explicit Internet chat rooms, requiring instead a quantifiable scientific methodology, or clinical diagnosis, even in a domain such as this that is not amenable to a hard-science approach. The result of this rule is to exclude

such testimony from criminal trials categorically, regardless of how important or relevant it may be.

This case presents the paradigmatic situation. Most lay jurors are likely to have little or no knowledge about sexually themed or fetishistic fantasy subcultures on the Internet. Learning about them from experts, like Dr. Berlin, who have studied sexual disorders and sexual subcultures in the online world, will often be vital for accurately distinguishing between true online sexual predators and individuals engaged in harmless fantasy speech. The approach adopted by the Eleventh Circuit here, however, means that jurors will be prevented wholesale from hearing this important information. Nothing in the law requires this anomalous result.

C. Review Is Warranted Because Of The Importance Of Expert Testimony In Prosecutions Under 18 U.S.C. § 2422(b).

Expert testimony regarding clinical diagnoses concerning sexual disorders and fantasy discussions on the Internet frequently is introduced—or sought to be introduced—in cases of attempted enticement under 18 U.S.C. § 2422(b). And for the reasons set forth above, the jury's ability to hear such evidence and to evaluate it with the benefit of the full adversarial process is apt to be critical to reaching accurate verdicts. Review by this Court is therefore important to the proper administration of justice in this bourgeoning field of federal criminal prosecution.

Prosecutions focusing on the use of the Internet to attempt to entice a child to engage in illicit sexual activity inherently place at issue the defendant's sexual interest in children and the nature of Internet communications. And, notwithstanding the severity of the punishments imposed for these offenses, the

mode of proof often requires little of the government. Typically, the government introduces the text of the Internet communications themselves (as it did here), which often will be sexually explicit in nature and therefore have a strong tendency to provoke disgust in a jury. The government often bolsters such evidence with testimony about the modus operandi of pedophiles and child sexual predators. See, *e.g.*, *United States* v. *Long*, 328 F.3d 655, 666-68 (D.C. Cir. 2003). Because courts have interpreted § 2422 as requiring only an intent to persuade or entice (rather than an intent to engage in a sexual act), see, *e.g.*, *United States* v. *Goetzke*, 494 F.3d 1231, 1236 (9th Cir. 2007) (per curiam); *supra* at 16, even the required proof of intent is low. And perhaps most importantly, because the charge involves (a) attempt, and (b) enticement, the charged conduct is not one but two steps removed from any actual sexual contact with children. Accordingly, the government often can persuade a jury to convict based on little more than email exchanges with undercover government agents.

Under such circumstances, expert testimony that a defendant is free from psychological disorders indicating genuine sexual interest in children and that people frequently engage in fantasy speech and role-playing on the Internet can provide the most persuasive means for defendants to demonstrate that they lacked the requisite intent and to diffuse the inflammatory nature of sexually explicit Internet communications. Internet sting operations target attempted enticement via the anonymous medium of the Internet, in which inhibitions are lowered and conversations easily turn graphic. Lay jurors, most of whom presumably have not engaged in similar communications themselves, do not necessarily understand the nature of these exchanges. See *Joseph*, 542 F.3d at

22 ("[I]t is unlikely that the average juror is familiar with the role-playing activity ... in the specific context of sexually oriented conversation in cyberspace."). Jurors (and indeed judges) may lack even basic familiarity with Internet chat rooms. See *id.* ("Many prospective jurors at Joseph's trial acknowledged that they had never visited a chat-room, and professed no understanding of what occurs there."); Dkt. 308, at 120-122 (multiple prospective jurors in Dr. Friedlander's trial stating they had never been to a chat room). If a defendant cannot demonstrate through expert testimony that he has no actual sexual interest in children, and that seemingly repellent Internet "chats" can be part of innocent adult behavior that may be more common than jurors realize, then a person accused of such crimes will have little meaningful ability to defend himself—as Dr. Friedlander's case regrettably illustrates. The evidence excluded by the Eleventh Circuit's rule was in Dr. Friedlander's case, and often will be in other cases, the most powerful, persuasive exculpatory evidence available. Without it, a defendant stands nearly defenseless against the allegations, damned by his own ugly words and unable to give them context or deeper meaning.

Review by this Court additionally is warranted because of the likelihood that, notwithstanding the frequency with which this issue arises, it will usually evade review. In any case in which the defendant pleads or is acquitted, the government of course cannot appeal. 18 U.S.C. § 3731. If the defendant goes to trial and is convicted but the testimony was admitted, the defendant has nothing to appeal on this issue. In short, this issue will reach the courts of appeals *only* when a defendant is convicted and the evidence was excluded. Even then, it will be adjudicated

only when the defendant has properly raised and preserved his objection in the district court and elected to include the issue in the appeal. This case therefore provides an important opportunity for this Court to clarify potentially dispositive rules of law in an area of increasing prosecutorial focus where the lower federal courts have taken confused and conflicting approaches.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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February 25, 2011

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

Nos. 09-11354, 09-13811

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES JACKSON FRIEDLANDER,
A.K.A. CHARLES FRIEDLANDER,
Defendant-Appellant.

Non-Argument Calendar.
Sept. 3, 2010.

Appeals from the United States District Court for the Middle District of Florida.

D.C. Docket No. 08-00318-CR-T-27-TGW.

Before EDMONDSON, PRYOR and MARTIN, *Circuit Judges.*

PER CURIAM:

Charles Jackson Friedlander appeals his conviction and 360-month sentence for child enticement, 18 U.S.C. § 2422(b). No reversible error has been shown; we affirm.[1]

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[1] The instant offense stemmed from online and telephone conversations between Friedlander and an undercover detective. Through these contacts, Friedlander made plans to abuse physically and sexually two children.

At Friedlander's first trial, the prosecutor mistakenly thought she had a more recent copy of the Diagnostic and Statistical Manual of Mental Disorders, Volume IV ("DSM IV") than Friedlander's expert witness. And when cross-examining the expert about the definition of "sadism," the prosecutor asked the expert why he did not have the most recent copy. The two both read from the copyright page of the prosecutor's copy of the DSM IV and concluded that the prosecutor's copy was more recent than the expert's. The prosecutor used this information in closing argument to argue that the expert was not credible. After a jury convicted Friedlander, the prosecutor notified the court that she had been mistaken about the DSM IV and that, in fact, the expert had the more recent copy. This revelation prompted Friedlander to move for a mistrial, which the district court granted.

Friedlander argues that his second trial violated the Double Jeopardy Clause because the prosecutor acted grossly negligent in mistaking the publication date of the DSM IV and goaded him into moving for a mistrial. We review *de novo* a possible violation of the Double Jeopardy Clause. *United States v. Thurston*, 362 F.3d 1319, 1322 (11th Cir.2004).

In general, when a defendant moves for a mistrial, the Double Jeopardy Clause is not implicated. *United States v. Shelley*, 405 F.3d 1195, 1200 (11th Cir. 2005). But a narrow exception exists—and double jeopardy principles may bar the relitigation of a case—if the prosecutor intentionally misbehaved for the specific purpose of goading the defendant into moving for a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 2088-89, 72 L.Ed.2d 416 (1982).

That the prosecutor mistook the zip code entry on the DSM IV copyright page for the publication date was not tantamount to goading intentionally Friedlander into moving for a mistrial. Both the defense witness and the prosecutor misread the copyright page. And as soon as she learned of her mistake, the prosecutor informed the court and opposing counsel. Nothing evidences that her misreading of the page was purposeful or intended to provoke a mistrial.[2]

About his second trial, Friedlander argues that the district court erred by (1) admitting prejudicial photographs and electronic correspondence in violation of Fed.R.Evid. 403 and 404(b); (2) allowing a detective to testify to the ultimate issue of whether Friedlander's realization of the contemplated sadomasochistic sex with the children would have been a violation of Florida law; and (3) precluding expert testimony about the clinical diagnoses of pedophilia and sexual sadism and the prevalence of sexual fantasy on the internet. We review a district court's evidentiary rulings for an abuse of discretion. *United States v. Docampo*, 573 F.3d 1091, 1096 (11th Cir.2009), *cert. denied*, No. 09-7833 (2010). We will not reverse an evidentiary ruling if "sufficient evidence uninfected by any error supports the verdict, and the error did not have a substantial influence on the outcome of the case." *United States v. Khanani*, 502 F.3d 1281, 1292 (11th Cir.2007).

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[2] Friendlander characterizes the prosecutor's conduct as gross negligence. But the district court concluded that the mistake was unintentional. And a district court's finding that a mistake was unintentional or not grossly negligent "is factual, binding upon the court of appeals unless clearly erroneous." *See United States v. Serra*, 882 F.2d 471, 473 (11th Cir.1989).

The district court abused no discretion in admitting the photographs and Friedlander's electronic correspondence with other adults discussing sadomasochistic sex. The discussions referred to similar conduct as that discussed in the charged offense. For instance, Friedlander discussed using the same sexual accessories (such as riding crops, leather belts, and razor strops) on the children that he discussed in the on-line chats. And the photographs depicted bondage-related imagery nearly identical to acts which Friedlander said he would perform on the children. This evidence was highly probative of Friedlander's intent to abuse physically and sexually children. *See* Fed.R.Evid. 404(b) (allowing evidence of other bad acts to show intent); *United States v. Ramirez*, 426 F.3d 1344, 1354 (11th Cir.2005) (a similarity between the prior act and the charged offense will make the other bad act highly probative about a defendant's intent in the charged offense). Given the highly probative nature of the evidence and that the court limited the evidence to that related directly to the instant offense, the evidence was not subject to exclusion under Rule 403. *See United States v. Dodds*, 347 F.3d 893, 897 (11th Cir.2003) (explaining that Rule 403 is "an extraordinary remedy which the district court should invoke sparingly," with the balance struck in favor of admissibility).

The detective's conclusion—that if Friedlander had carried out his stated conduct, it would have been a violation of Florida law—was a central element of Friedlander's guilt or innocence. *See Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir.1990) ("[a] witness may not testify to the legal implications of conduct"). But any error in admitting the testimony was harmless. The court instructed the jury that the court, not the parties or witnesses, was

the sole source of legal standards applicable to the case and that the jury was not bound to accept the testimony or conclusions of any witness. *See Maiz v. Virani*, 253 F.3d 641, 667 (11th Cir.2001) (concluding that admitting a witness's legal conclusions was harmless when the court instructed the jury that it was not bound to accept the witness's conclusions and confirmed the court as the sole source of applicable legal standards). And the court explained to the jury that it had to find each element of the crime beyond a reasonable doubt, including that the conduct, if completed, would have been a criminal offense under Florida law.

About the expert testimony, the district court committed no error in precluding testimony about the prevalence of "internet fantasy." The court noted that the expert's opinion was unreliable as it was not based on the DSM IV or quantifiable scientific methodology. *See United States v. Henderson*, 409 F.3d 1293, 1302 (11th Cir.2005) (unreliable testimony that is not based on accepted scientific methodology may be excluded).

Friedlander did not preserve his claim about the testimony on the clinical definitions of sadism and pedophilia. At trial, the detective testified that Friedlander's post-arrest interview included talk of sadomasochism.

Friedlander moved the court to expand its pre-trial limitation on the expert's testimony and allow the expert to testify that, from a medical perspective, Friedlander was not a sexual sadist. The court reserved ruling on the motion and allowed Friedlander the opportunity to address the issue by proffer when and if he chose to call the expert as a witness. But Friedlander did not call the expert; so, the district court never ruled on the objection and motion that

are the bases for Friedlander's instant argument. *See United States v. Khoury*, 901 F.2d 948, 966 (11th Cir.1990) (explaining that parties must re-raise objections with particularity when an issue becomes ripe and that the overruling of a motion in limine about hypothetical concerns does not suffice; if a party fails to do so, our review is for plain error). Here, the only way to evaluate prejudice adequately would be to compare the expert's actual testimony to the proffered testimony that the court might have disallowed. Thus, given Friedlander's failure to re-raise his objection and that our review would only be speculative, we cannot say the district court plainly erred.

We now address Friedlander's challenge that his sentence substantively is unreasonable. We evaluate the substantive reasonableness of a sentence under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007). The party challenging the sentence bears the burden of establishing that the sentence is unreasonable in the light of both the record and the 18 U.S.C. § 3553(a) factors. *United States v. Talley*, 431 F.3d 784, 788 (11th Cir.2005).[3]

We conclude that Friedlander's 360-month sentence—which fell in the middle of the applicable guidelines range—was reasonable. *See id.* (noting that "ordinarily we would expect a sentence within

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[3] Under section 3553(a), a district court should consider the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence to provide adequate deterrence, respect for the law, and protection of the public, policy statements of the Sentencing Commission, provision for the medical and educational needs of the defendant, and the need to avoid unwarranted sentencing disparities. *See* 18 U.S.C. § 3553(a)(1)-(7).

the Guidelines range to be reasonable"). The district court stated that it had considered the section 3553(a) factors and noted that the nature and circumstances of Friedlander's offense were "despicable" and that the sentence imposed reflected the seriousness of the offense and promoted respect for the law. "The weight to be accorded any given [section] 3553(a) factor is a matter committed to the sound discretion of the district court, and we will not substitute our judgment in weighing the relevant factors." *United States v. Amedeo*, 487 F.3d 823, 832 (11th Cir.2007) (quotation and citation omitted).

Given that Friedlander was convicted of using interstate communication in an attempt to coerce two children into sadomasochistic sexual acts, we cannot say that the within-range sentence failed to reflect the purposes of sentencing or that the district court committed "a clear error of judgment in weighing the [section] 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *See United States v. Pugh*, 515 F.3d 1179, 1203 (11th Cir.2008).

AFFIRMED[4]

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[4] We reject Friedlander's challenge that section 2422(b) is unconstitutional because (1) he had no contact with a minor and, thus, lacked the necessary intent, and (2) the statute's application violates his right to free speech. These arguments squarely are foreclosed by our precedent. *See United States v. Murrell*, 368 F.3d 1283, 1287-88 (11th Cir.2004) (expressly concluding that a conviction under section 2422(b) requires neither direct communication with a minor nor an actual victim); *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir.2004) (explaining that "[s]peech attempting to arrange the sexual abuse of children is no more constitutionally protected than speech attempting to arrange any other type of crime").

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JUDGMENT IN A CRIMINAL CASE
CASE NUMBER: 8:08-CR-318-T-27TGW
USM NUMBER: 50238-018

UNITED STATES OF AMERICA

vs.

CHARLES JACKSON FRIEDLANDER

Defendant's Attorney: George Tragos & Peter Sartes, ret

THE DEFENDANT:

___ pleaded guilty to count(s) of the.
___ pleaded nolo contendere to count(s) which was accepted by the court.
_X_ was found guilty on Count One of the Indictment, after a plea of not guilty.

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 2422(b)	Child Enticement	July 21, 2008	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s)

___ Count(s) (is)(are) dismissed on the motion of the United States,

IT IS FURTHER ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in economic circumstances.

Date of Imposition of Sentence: July 21, 2009

/s/ JAMES D. WHITTEMORE
JAMES D. WHITTEMORE
UNITED STATES DISTRICT JUDGE
DATE: July 22, 2009

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THREE HUNDRED SIXTY (360) MONTHS.

Defendant shall be given credit toward the service of a term of imprisonment for any time he/she has spent in official detention prior to the date the sentence commences—(1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the Defendant was arrested after the commission of the offense for which the sentence was imposed; that has not been credited against another sentence. 18 U.S.C. § 3585(b).

X The Court makes the following recommendations to the Bureau of Prisons: The Court recommends confinement at Butner, NC.

X The defendant is remanded to the custody of the United States Marshal.

__The defendant shall surrender to the United States Marshal for this district.

__at__a.m./p.m. on __.
__as notified by the United States Marshal.

__The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

__before 2 p.m. on __
__as notified by the United States Marshal.
__as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____to_____

___at_____, with a certified copy of this judgment.

_____

United States Marshal

By:_____

Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of LIFE.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. However, the Court orders the defendant to submit to random drug testing not to exceed 104 tests per year. (Check, if applicable).

__ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

If this judgment imposes a fine or restitution it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall

not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

(X) Defendant shall participate as directed in a mental health program specializing in sex offender treatment approved by the probation officer and abide by the rules, requirements, and conditions of the treatment program, including submitting to polygraph and/or computer voice stress analysis (CVSA) testing. The results of the polygraph and/or CVSA examination may not be used as evidence in Court to prove that a viola-

tion of community supervision has occurred, but may be considered in a hearing to modify release conditions. Further, the defendant shall contribute to the costs of such treatment and/or polygraph testing not to exceed an amount determined reasonable by the probation officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Treatment Services.

(X) The defendant shall register with state sexual offender registration agency(s) in any state where he resides, visits, is employed, carries on a vocation, or is a student, as directed by the probation officer.

(X) The probation officer shall provide state officials with all information required under Florida sexual predator and sexual offender notification and registration statutes (F.S. 943.0435) and may direct the defendant to report to these agencies personally for required additional processing, such as photographing, fingerprinting, and DNA collection.

(X) The defendant shall have no direct contact with minors (under the age of 18) without the written approval of the probation officer and shall refrain from entering into any area where children frequently congregate including: schools, day-care centers, theme parks, playgrounds, etc.

(X) The defendant is prohibited from possessing, subscribing to or viewing any video, magazines, or literature depicting children in the nude and/or in sexually explicit positions.

(X) The defendant shall not possess or use a computer with access to any online service at any location (including employment) without written approval from the probation officer. This includes access through any internet service provider, bulletin board system, or any public or private computer network systems. The defendant shall permit routine inspection of his computer system, hard drives, and other media storage materials, to confirm adherence to this condition. This inspection shall be no more intrusive than is necessary to ensure compliance with this condition. The defendant shall inform his employer, or other third party who may be impacted by this condition, of this computer-related restriction and the computer inspection provision of the condition.

(X) The defendant shall submit to a search of his person, residence, place of business, computers, or vehicle conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall inform any other residents that the premises may be subject to a search pursuant to these conditions.

(X) The defendant shall provide the probation officer access to any requested financial information.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Total Restitution
Totals	$100.00	$25,000.00	$N/A

__ The determination of restitution is deferred until _____ An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

__ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$___	$_____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for the offenses committed on or after September 13, 1994, but before April 23, 1996.

__ Restitution amount ordered pursuant to plea agreement $_____

__ The defendant must pay interest on a fine or restitution of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

__ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

__ the interest requirement is waived for the __ fine __ restitution.

__ the interest requirement for the __ fine __ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. X Lump sum payment of $100.00 Special Assessment, and $25,000.00 Fine due immediately.

B. ____ Payment to begin immediately (may be combined with ___ C,___ D,___ or ___F below); or

C. ____ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ days (e.g., 30 or 60 days) after the date of this judgment; or

D. ____ Payment in equal ____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of

_____, (e.g., months or years) to commence _____ (e.g. 30 or 60 days) after release from imprisonment to a term of supervision; or

E. ____ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time, or

F. ____ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

__ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

__ The defendant shall pay the cost of prosecution.

__ The defendant shall pay the following court cost(s):

__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 8:08-CR-318-T-27TGW

17 NOVEMBER 2008
TAMPA, FLORIDA
1:25 - 3:30 PM
PAGES 1 - 110

UNITED STATES OF AMERICA,
Petitioner,

vs.

CHARLES FRIEDLANDER,
Defendant.

TRANSCRIPT OF DAUBERT HEARING BEFORE
THE HONORABLE JAMES D. WHITTEMORE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Petitioner: Amanda C. Kaiser
United States Attorney's Office
Middle District of Tennessee
400 N. Tampa Street
Suite 3200
Tampa, Florida 33602

For the Defendant: George E. Tragos
Tragos & Sartes
Suite 800
601 Cleveland Street
Clearwater, Florida 33755

* * *

[MR. TRAGOS]

Q Okay. Have you had an opportunity to review [11] any of the evidence in this case?

[DR. BERLIN]

A Yes. I was sent various discovery materials. It's turned out that they're quite voluminous, so I'm still continuing that process. But I have reviewed a good deal of that—well, I'd better be careful. I've reviewed parts of that information.

[MR. TRAGOS]

Q Okay. Have you reviewed a sufficient amount in order to come to some conclusions or opinions?

A I have, with the understanding, which is always the case, that if I'm presented with new information and it's information to suggest I should change an opinion, I'm not—I'm not adverse to doing that.

Q Okay. After reviewing the documentation—well, let me ask you this. You're familiar with pedophilia?

A Yes, sir.

Q And are there certain criteria that you use in identifying pedophilia?

A Well, you say that I use. The diagnostic manual, the DSM that we were talking about spells out the diagnostic criteria for each of the mental disorders. And to the extent that pedophilia is a mental disorder, it defines diagnostic criteria for that condition.

[12] Q Okay. What is the diagnostic criteria?

A Well, I'm paraphrasing here, but essentially a person with pedophilia experiences intense recurrent

erotically arousing, that is, sexually arousing fantasies and urges about children, so that's one part of the criteria. That has to be present for a period of at least six months because they're not trying to talk about someone who might have a fleeting thought or an urge of that nature.

And then the criteria also talks about the—that the individuals experiencing these fantasies and urges is either going to be distressed by the fact that he's having them or impaired some way in his functioning.

There's also a comment in the DSM, because the core mental elements are fantasies and urges that if someone has repeatedly behaved sexually with children, even if they're denying the fantasies and urges, one can still make the diagnosis. So that's a shorthand summary of the major issues.

Q What about the acting out on nonconsenting persons, is that part of it?

A No. I think you're thinking more of—

Q Sadism?

A —sexual sadism in that case. A child by [13] definition is always nonconsenting because they haven't achieved the maturity level that would enable them to give a meaningful informed consent.

Q Are you able to take that criteria and apply it to the facts as you know it in this case?

A Well, I'm going to have to be careful in terms of how you phrase that question. I can certainly come to a conclusion about whether or not I believe there's sufficient evidence to diagnose pedophilia in this case. So if I haven't answered your question you can re-ask it, but I'm trying to be as clear as I can.

Q Well, go ahead and do what—go ahead and do that.

A Okay. How do I put this. There simply isn't sufficient evidence here that this is a man who has either acted in a way where he's been repeatedly involved with children or involved with children at all, for that matter, in terms of actual sexual contact. There's nothing that he's acknowledging in terms of his own self reports about having desires sexually for children.

Obviously, however, he's in a situation where, understandably, he wants to put his best foot forward, so I have to look at whether there's [14] anything else that might infer if that's there, even in the absence of his self admission.

Now, in this case because his computers have been confiscated, there's a great deal of information there. He had, for example, no child pornography, which would be unusual for someone who's using a computer and has pedophilia. He's made no attempt to directly contact a child and induce a child into sexual activity.

Again, he's 78 years old, and there's no evidence of a prior criminal record or any prior acts involving children. So putting it altogether, I simply cannot find enough evidence to suggest that he would qualify for that condition.

Q Okay. Is sexual sadism, is that also contained in the DSM?

A Yes, sir.

Q And what are the criteria for that?

A Well, again, I'm just going to put this in laymen's terms. They're spelled out in terms of

fantasies, urges and duration and so on. But just to put it simply in laymen's terms, someone with sexual sadism is an individual who is sexually aroused, erotically aroused by the pain, suffering and humiliation of another person.

[15] One critical point, though, that the DSM does make is that we're talking about real rather than simulated acts that cause the person to become sexually aroused. There are, for example, people who engage in consensual acts of bondage. There are people who engage in consensual acts of spanking and things of that sort.

One can talk about what one thinks about those kinds of actions, but that wouldn't be evidence of sexual sadism. The sexual sadist is someone who in real life is aroused by real pain and suffering of an actual individual, and it tends to involve coercive and nonconsenting activity.

Q Now, you talked about fantasy versus reality.

A Yes.

Q Okay. Are you familiar with that type of activity on the Internet?

A Yes, sir.

Q And how are you familiar with that?

A Well, just in terms of the work that I do. In recent years, particularly many of the referrals that I've seen to be evaluated involve activities over the Internet. I've published, as I mentioned earlier, an article about that that was part of a larger book, and I reviewed the articles in that [16] book, which is an attempt to update much of what goes on on the Internet. I'm familiar with various sites that are out there.

So I guess it's analogous to asking you as an attorney how are you familiar with what goes on in the legal system. You first get a basic education. You get certified by passing certain examinations. You have continuing education in terms of formal courses and—and what you learn through your work experiences. So that's the way in which I also would keep up in—in terms of my area of expertise.

Q Can you give us kind of a brief outline or illumination of how fantasy works on the Internet.

A Well, it works—

Q How fantasy works on the Internet and why it's so prevalent on the Internet.

MS. KAISER: Objection, lack of foundation.

THE COURT: Overruled for purposes of—

[DR. BERLIN] And, again, I want to make sure I understand the—the question and if I'm not responsive, let me know. But there's two ways in which I believe fantasy—at least two, there may be more, but—occur on the Internet.

One has to do with simulated role-playing [17] activity. It's clear now that many people on the Internet pretend to be someone whom they're not. Many people have sort of an Internet persona, excuse me, in which they act out fantasies. They're pretending to be someone that they're not or pretending to be doing something that they're not doing. There's clear evidence in this case, for example, that that was—that that was occurring.

Fantasies also are an aspect of the Internet to the extent that people who in a sense feel like they in the privacy of their homes can explore their fantasy lives. For example, most people are not going to publicly

talk about things such as having sexual feelings for animals, which for obvious reasons most of us find disgusting, or having sexual fantasies about corpses.

And yet we've now learned from the Internet that there are sites out there, to use the two examples I just gave, for both of those and that they get remarkable numbers of hits. And, of course, that in terms of the issue of fantasy begs the question, to what extent in any given instance is this pure fantasy. And I've seen cases with corpses that I just talked about where it's clearly nothing more than fantasy, or is this fantasy a [18] reflection of an actual interest in crossing over into real life experience. And, again, I've seen cases where that happens in terms of the example I'm giving, as well.

So just to summarize what I've said, there's kind of the exploration of fantasy life through going to certain sites and expressing certain interests, and then there's a more formal role playing and pretending to be a particular persona.

BY MR. TRAGOS:

Q When you're doing your work, do you have to try to make a determination when you're speaking to someone whether or not what he's telling you is part of a fantasy persona or whether or not it's real?

A Certainly that's often extremely important. It's going to have implications both for the persons own well-being and it obviously has implications for society at large. So the answer is yes, I do need to make those distinctions. And as I said a moment ago, I've seen cases that fall on both sides of that line.

Q What—how do you determine or what do you look for to determine whether or not—again, in

general—whether or not a case is someone that is pure fantasy versus someone who really—that this [19] is really real for them and they're really going to act it out?

A Well, I really try to look at the totality of the information available to me and also to apply my body of knowledge. If I can make an analogy, it would be similar to how does one come to a conclusion in court where it's all circumstantial evidence. You can talk to people and ask them about their experiences, you can look for evidence of the kinds of behaviors they've engaged in.

In terms of applying a body of knowledge, I would know, for example, that the best way to make a—to come to some conclusion about how someone is likely going to be behaving is that of a past pattern of behavior in front of me. So I look for pattern the same way a police force might look for MO, have they behaved repeatedly in a certain fashion. So it's really the totality of the information using my particular body of knowledge and then trying to make a conclusion.

And if I may add, sometimes it's easy and obvious. I'm sorry, I didn't mean to interrupt you. But, you know, there's cases where the person admits they have these interests. There's cases where you look at their criminal record, and this is the third [20] time they've been arrested for a particular kind of activity. There's cases where other people have called to my attention that someone in their family has this problem, and then there's other cases that can be more challenging.

Q Okay. When looking at the facts in this case, what items would you use to make a determination of whether or not it was or wasn't fantasy?

A Well, again, the issue in this case has to do with knowingly. In other words, if the issue was did somebody attempt to do something, that's purely a factual issue. Either they did or they didn't.

As I understand it, the issue here is did this particular gentleman knowingly attempt to do something, and so that brings into it the sphere of state of mind, of—of mental state. And so I'm having to try to come to some conclusion about that. In terms—

Q Let me interrupt you just for a second, with the court's permission. I don't want you necessarily to come to a conclusion that—the court's ruled that we're not going to come to a conclusion about the mental state, if I understand the court's ruling from Friday.

Tell me just in this case what things you see [21] in this case that you would use to come to a conclusion, not what your conclusion is.

A Okay. So let me be careful because I don't want to cross the line in how I answer it. I would look—for example, here's a 78-year-old man. I would look at what is the evidence as best I can determine of how he's behaved in actual real life situations. That's one thing I would look at.

I would also look at the evidence of his conversations to try to get some sense where the facts are known of the extent to which they were fantasy based or reality based.

To give an example, to make sure I'm being clear, he has talked repeatedly about being very strict as a father and in his family. He talked repeatedly about beating and whipping his own son. He talked repeatedly about beating and disciplining—I should be careful about repeatedly on this one—he talked

about having been a caretaker for the alleged grandchildren of a friend and having tough discipline with them, and seemed to be inferring that he had whipped them, as well.

And, again, I could go on. But the point is there's very clear evidence here that those were fantasy based and not reality based conversations. [22] The reason I say that evidence is there is that he's never been married. He's never had any children. He's never had a family of his own.

Even in terms of other children, the government has access to the same conversations that I looked at, and I'm making a presumption here but I think it's a valid one, that if they had evidence that he had actually abused the grandchildren of a friend of his, that they would have proceeded to investigate and charge him accordingly.

So for all of these reasons, it seems pretty clear to me that the bulk of the conversations he had on the Internet with what unbeknownst to him had been a government agent were fantasy as opposed to reality conversations.

Q Now, also, I think you had an opportunity to I think review some of these conversations; correct?

A Yes, sir.

* * *

BY MS. KAISER:

Q For the issues that you listed on page two of your report, sir, that you said the issues—issues considered, you said, "In evaluating Dr. Friedlander, I have attempted to address the following three issues. The first was, to what extent were his Internet chats about beating children a manifestation

of a fantasy interest in role playing versus an interest in actually consummating real life acts." Is that correct?

[DR. BERLIN]

A Yes. You were just reading what I said.

Q Okay. And you've testified previously, sir, that there was no type of scientific test that would lead you to conclude one way or the other?

A That's correct.

Q The next thing that you listed that you were asked to consider was at his current age of 78, does [50] Dr. Friedlander have a psychiatric disorder that might have predisposed or driven him to become sexual with a child; is that correct?

A That's correct. Although, as I think about it, I'm not clear that I was asked to consider, I may have simply decided to consider. But otherwise it's correct.

Q All right. And your conclusion was that he did not; correct?

A Well, I think my conclusion was talked—was couched in terms of reasonable medical certainty.

Q Well—

A Well, then, let me—if I may, let me look at the report because I don't want to be blind at it, if I may.

MR. TRAGOS: May I, Your Honor?

THE COURT: Yes. Let him have the report.

[DR. BERLIN]: Thank you.

MS. KAISER: Sure.

[DR. BERLIN]: Okay. Again, I'm sorry. I just want to be clear. You're still talking about point two, about

whether he has a psychiatric disorder that might have predisposed him; is that correct?

BY MS. KAISER:

Q Correct.

[51] A Okay. I just wasn't sure where you were at. But the answer to your question is yes.

Q And so you weighed that. And what was the result of your evaluation with that, with respect to that?

A Well, I did not feel that he had a psychiatric disorder. I was more specific, either pedophilia or sexual sadism. And again, in terms of my conclusions, someone who has that disorder would be more likely than someone who doesn't to try to approach a child in a sexual way.

Q And you—

A And again, I'm sorry, the sexual sadism would have to involve an element of pedophilia, as well, if it was a child they were approaching. I'm sorry.

Q Okay. And you based your opinion that he's not a sadist or—I think a sexual sadist or a pedophile on your opinion that he was being truthful when he said it was all fantasy?

A No, ma'am. I made that—I'm trained to diagnose. I mean, that's what I do as a physician, that's what I do as a psychiatrist. I don't simply depend upon what he tells me. I look at all of the information available and then come to a conclusion.

I did not have any information available to me [52] that I felt would satisfy that criteria for him to be diagnosed either with pedophilia or with sexual sadism.

* * *

[THE COURT] * * *

[77] So under *Daubert*, I'm going to restrict you, I reiterate. He's not coming in here to tell this jury whether or not this man knowingly did anything or intended to do anything, as opposed to simply identifying criteria that he would look for in determining certain things, making a diagnosis.

MR. TRAGOS: I didn't want to interrupt the court.

THE COURT: That's fine. I just wanted to give you that as a predicate.

MR. TRAGOS: Okay.

THE COURT: I know you tried to avoid that, but it's almost inescapable that he's going to delve into these matters.

MR. TRAGOS: Well, that's why—and I understand, of course, why the court overruled my objection. But that's why I started to object during the prosecution's case because I thought the prosecution was going well beyond what I tried to limit him to in my direct examination, because I did in the direct examination even stop him once when he was going to give an ultimate conclusion.

All I'm saying is there's steps I think in this. Step one, him telling us his expertise on pedophilia, sexual sadism and fantasy chats. On the [78] fantasy chats, the DSM specifically talks about fantasy. And it's no different than, for instance, a law enforcement officer testifying about how a—because he's interviewed so many drug defendants, he can tell you how a boat gets from Colombia to the United States. He has sufficient experience and education and knowledge to talk about Internet fantasy as much as a law enforce-

ment officer would be able to talk about a modus operandi.

THE COURT: That's the ultimate fact. You are contending that your client was engaged in fantasy and never intended to engage in any of the conduct charged in Count One of the indictment.

MR. TRAGOS: All I'm going to ask him to do is tell us about sexual fantasy, how it exists, how it evolves and how it's used on the Internet.

THE COURT: Well, that's not what you did here today, though.

MR. TRAGOS: I did it in two parts.

THE COURT: You asked him all kinds of questions about—

MR. TRAGOS: I know.

THE COURT:—whether he was engaged in fantasy or not and why not if he didn't think he was. And he went into a long explanation of the [79] falsity of what he's saying and, therefore, he was fantasizing. I don't accept that.

MR. TRAGOS: That's part two. Part one is what I just said. Part two would be whether or not any of those three things he would be allowed to take the facts of this case and plug them into any one of those three explanations. So at first we're talking about three explanations: Pedophilia, sexual sadism, fantasy chatting on the Internet.

Part two. Can he plug in what he knows about this case, does this criteria—does Dr. Friedlander fit the category of pedophilia. I don't think that's the ultimate issue. I think that is just a factor that the

jury can take into consideration. But I think he can plug those facts into pedophilia.

Number two, sexual sadism. Does he fit the criteria for sexual sadism? I think, again, that is a factor, not the ultimate issue that the jury can be plugged—because the jury as the fact finder I think can be helped by this information.

Part three, sexual fantasy. If the court doesn't believe—and I didn't ask him for his ultimate conclusion on whether it was or wasn't a fantasy. What I asked him was—and I was very [80] careful in how I asked him—what I asked him was what do you see in the facts in this case that would—that you would take into consideration in determining whether or not this was or wasn't fantasy.

THE COURT: That begs the question. You know that. Because then he comes out with all of his theories and conclusions and opinions about why it was a fantasy. That's why I said it's a slippery slope.

MR. TRAGOS: But I think if he does not come up with the opinion and say this was or wasn't a fantasy, if he doesn't give the ultimate conclusion, the ultimate opinion, then I think that he should be allowed to give the jury that second piece of the fantasy of information that they could have because, you know, jurors may not—and we may—we may—and I know a lot, but the case law says that the reason you have experts is because jurors, the common everyday man sitting in that jury box may not have all the extensive knowledge and information that they really need and that things can help them.

A lot of those people, Your Honor, may not know about the cultural fantasy on the Internet, the cultural fantasy. They may not know about it. They

[81] may not know it exists. They may not even use the Internet, for all I know. And we know there's still a substantial portion—we know what kind of jurors we get in the Federal Court as far as age and there may be a substantial portion of that jury that is unfamiliar with the Internet.

I have here a man who's certainly qualified to tell them about sexual fantasies on the Internet. The court may not allow me to allow him to plug in the facts of this case, and I think that's where the court may be leaning, but if the court doesn't allow me to do that, then I think at the very least he should be allowed to expound on sexual fantasies on the Internet and how that exists out there.

He gave multiple examples, and the court even asked him for one, about sexual fantasy on the Internet.

* * *

[83] MR. TRAGOS: All right. Pedophilia, sexual sadism and fantasy chatting.

THE COURT: I think fantasy chatting is pretty much out the door, to narrow the discussion a bit. There's nothing scientific or experience based in his opinions. He simply has opinions as a qualified expert in psychiatry. His opinions are no more reliable than those of yours and mine.

MR. TRAGOS: What if an officer—if a law enforcement officer got up on the stand and is asked the question, tell me how drug dealers get their drugs from Colombia to the United States. And the way he knows is because he's interviewed—and the case law supports him testifying to this. He's interviewed five drug dealers and they've told him this, so that

qualifies him to testify to the jury about how drugs get from Colombia to the United States. He's talked to far more than five—

THE COURT: Not analogous, different situation so let's not engage in hypotheticals. This is no different than having someone come in and tell us how you tell someone is telling the truth.

MR. TRAGOS: I'm not talking about him giving an opinion, I'm talking about him just explaining [84] what defines sexual fantasy on the Internet, not about plugging into these facts.

THE COURT: I don't think he needs to explain that to the jury. That's not going to be helpful to the jury in deciding this case.

MR. TRAGOS: Okay. So then we're limited to pedophilia and sexual sadism.

THE COURT: As far as I'm concerned you are. I'm applying *Daubert*. I'm not just—

MR. TRAGOS: Well, you're the only opinion that counts, Judge.

THE COURT: I'm sorry?

MR. TRAGOS: You're the only opinion that counts, so—

THE COURT: Well, it's not only my opinion. The Eleventh Circuit might agree with me or not. But I've applied *Daubert*. He's just confirmed in my short conversation with him that there is no scientific methodology or experience based methodology making his opinions about Internet fantasizing reliable.

MR. TRAGOS: What about just being an expert with his experience, not a scientific issue?

THE COURT: Or relevant. The testimony is not relevant in that regard. This defendant has the [85] right if he chooses to get up there and tell the jury, I was fantasizing, I didn't mean it, and here's why. That's not scientific. That's fact. That's the ultimate fact. I either intended to do it or I didn't intend to do it.

So let me ask Ms. Kaiser—

MR. TRAGOS: Your Honor, would he be allowed to at least say—well, I'll let the court ask Ms. Kaiser.

THE COURT: Ms. Kaiser, the question is relevance under *Daubert*. We've got three subjects, pedophilia, sexual sadism and Internet fantasy. Internet fantasy, I don't think he's able to present relevant testimony for the reasons I've alluded to, or reliable testimony. That doesn't mean he doesn't have a valid opinion or an opinion that's credible. It simply means from the standpoint of admissibility under *Daubert*, it's not reliable expert testimony. That's all.

MS. KAISER: I agree.

THE COURT: No more than someone coming in and telling us how to observe someone and tell whether or not they're telling the truth. The jury is fully capable of making that determination.

* * *

[92] THE COURT: Briefly, Mr. Tragos.

MR. TRAGOS: Your Honor, during the interview of Dr. Friedlander by the law enforcement agent, they must have spent a good 15, 20 minutes at [93] various times talking to him with about, well, you do have an interest in children; don't you? You do get sexually aroused by children; don't you? You have had other children do this to you; don't you? They

keep going over and over again his history as a pattern of child molesting or having a sexual interest in children.

He is going to—Mr.—Dr. Friedlander—and it's only relevant if he testifies, but if he testifies talks about having no history and no propensity toward—or any interest in having sex with children, that he's not a sadomasochist, he doesn't like beating people and doing all this stuff.

If the court remembers, the prosecution has said they plan and the court approved them bringing in any pictures that they found on his computer dealing with whipping, with belts, with any of that material. Not that it ever happened, but the fact that there is a picture or someone talked about it on his computer, the court told the prosecutor they're going to let it in.

So when the prosecutor says, we're not going into—her quote was that he didn't just wake up one morning—that this wasn't part of sadistic [94] behavior. Sadistic behavior doesn't matter, but they're putting in sadistic behavior. That's going to be part of their case.

And so—and that the sadistic behavior, they also claimed in the argument on Friday, that it was sexual in nature. And if it's—so they're putting in sexual sadomasochistic history behavior, they're putting in a history of sex with a child or wanting to have sex with a child, that's why he's doing this.

They have an interview where they talk to him about his history of having sex with children. So I don't see how it can't be relevant that if he doesn't meet the criteria, that while the jury can't take that as a piece of information that he doesn't meet the criteria for a pedophile or for a sexual sadist, and he

gets up there and he denies both, he denied it in the interview to law enforcement officer, and yet the jury can't take that into consideration.

I don't see how they can't have that piece of information of what a person who meets that criteria, what they are or aren't.

THE COURT: Well, under *Daubert*, for the record, 526 U.S. 137, discussed by the Eleventh [95] Circuit, and 415 F.3d 1257 in *United States versus Brown*, *Daubert* enumerates a number of factors the court considers in determining the admissibility of expert testimony. This is a flexible test. Any number of criteria in addition to those identified by the Supreme Court can be considered by the court in determining ultimately whether the proffered testimony is reliable and relevant.

In reverse order, I find without any hesitancy that Dr. Berlin's testimony concerning Internet fantasies versus reality is not reliable, does not meet the criteria for expert testimony under *Daubert*, would not assist the jury under Rule 702. The jury is perfectly capable of determining whether or not this defendant was fantasizing or not when he engaged in the chats that he apparently did.

Reliability being the lynchpin, if you will, he can— Dr. Berlin identifies no scientific methodology, testing, anything that I can comfortably premise a finding of reliability on.

The DSM doesn't recognize that as a diagnosis. Of course, fantasy and fantasizing is mentioned, but it's not a separate diagnosis, unlike pedophilia and sexual sadism.

And in any event, any testimony concerning [96] whether this defendant was fantasizing or intended this to be reality goes to the ultimate determination of fact the jury will be asked to draw and is, therefore, inadmissible under 704(b).

With respect to pedophilia and sexual sadism, the government has indicated that it intends to buttress its case against the defendant by placing in evidence photographs and other chat-type evidence engaged in by this defendant.

I don't know the relevance of any of that, Ms. Kaiser, except to buttress the government's contention that the defendant knowingly engaged in the conduct alleged so as to induce a child to engage in some type of sexual activity. Because of that, these issues become relevant. The government's essentially appropriately putting on evidence of similar acts, evidence—it goes to issue of intent so it's not purely propensity evidence. It goes to his intent and knowledge. It is admissible, appropriately so.

If the defense has an evidentiary foundation, vis-a-vis testimony of the defendant, placing in issue whether or not he has sexual attraction to children consistent with a diagnosis of pedophilia, or his propensity to engage in sexual sadism, [97] meaning his own propensities, not from an evidentiary standpoint, I think the defendant has the right to call Dr. Berlin for a limited purpose.

Ms. Kaiser is correct. Even if Dr. Berlin has diagnosed Mr. Friedlander using appropriate criteria under the DSM which is a recognized and acceptable, as he said, Bible of psychiatry, that's not a defense under Section 17. He will not, therefore, be permitted

to express an opinion or diagnoses of this defendant. It's not relevant.

What he can do, if you choose, Mr. Tragos, he can testify based on his background and experience as to the criteria that a psychiatrist or clinical psychiatrist in his position would turn to in determining whether one was a pedophile and/or likely—well, I should not use the word likely. Let me retract that. I'm not sure what the noun would be. Sadomasochist?

MR. TRAGOS: S and M.

THE COURT: Well, I know that's the topic, but whether one is that or not, I assume he said there's a diagnosis.

MR. TRAGOS: Right.

THE COURT: The problem that presents itself here is that whether or not this defendant is or is [98] not a pedophile, is or is not one who engages in sexual sadism is not relevant to the ultimate question of whether he violated the statute. But if the defendant places in issue his knowledge, his intent, surely it would be helpful to the jury to understand the criteria that an expert in that field would look to in determining whether one is or is not.

But as Ms. Kaiser correctly points out, and the doctor will never admit this, understandably so, you don't have to be a pedophile to violate the statute, nor do you have to be a sadomasochist to violate the statute.

So I do find that under *Daubert* his testimony, to the extent that it could assist the jury in understanding those two recognized sexual disorders—and I say disorders, I say that from the context of psychiatry, because he's recognized them as diagnosed

sexual disorders. He made it very clear that we're not talking about consensual bondage situations like that. We're talking about the types of pain and suffering inflicted on another that arouses one sexually as opposed to a consensual situation. He draw that distinction early on. I think that's important.

[99] So I'm granting the government's motion in part, striking and prohibiting Dr. Berlin from testifying at all about sexual fantasies on the Internet, and from expressing an opinion or diagnoses as to this defendant because it simply is not relevant. On the other hand, he is able to under *Daubert*, he's well qualified and his testimony is reliable, to identify and explain what constitutes from a psychiatric perspective clinical and forensic pedophilia and sexual sadism.

That being said, Ms. Kaiser, is it still your intention to look for and engage a psychiatrist or psychologist or other expert to testify?

MS. KAISER: I'd like to consult with the expert before I make the final determination, Your Honor.

THE COURT: You need to tell me now because, otherwise, I'm getting this case—setting this case for trial on short notice.

MS. KAISER: At this point, yes. Yes.

THE COURT: What in the world would your expert testify to, that Dr. Berlin is totally off his rocker in relying on the DSM? Think about that. This guy is probably as qualified as you're going to find in this particular area. I don't think anybody [100] would ever challenge his reliance on the DSM manual. He's not going to express opinions about this defendant.

* * *

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
[Filed Oct. 28 2010]

No. 09-11354-FF and 09-13811-FF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES JACKSON FRIEDLANDER,
A.K.A. CHARLES FRIEDLANDER,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

BEFORE: EDMONDSON, PRYOR and MARTIN, *Circuit Judges*.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ J.L. EDMONDSON
UNITED STATES CIRCUIT JUDGE

APPENDIX E

November 9, 2008—Page 1 of 8[1]

George Tragos, Esquire
Attorney at Law
601 Cleveland Street
Suite 800
Clearwater, Florida 33755

RE: Charles Friedlander (DOB: 5/28/30)

Dear Mr. Tragos:

I am forwarding this brief report to detail my clinical impressions regarding your above-noted client, most specifically with respect to his alleged criminal misconduct. As you know, I evaluated Dr. Friedlander psychiatrically for a period of approximately four hours (from 9:30 AM until 1:30 PM) on October 30, 2008. In addition, I have reviewed (and am still in the process of further reviewing) the voluminous relevant "discovery" materials that you have forwarded to me. Because you are already quite familiar with those materials, and with your client's background, I will not take the time to further summarize that information here.

Briefly, in terms of my own professional background, in addition to having earned a Ph.D. degree in Psychology, I am also both a Board-Certified Psychiatrist, as well as an Attending Physician at The Johns Hopkins Hospital. My particular area of expertise within the field of psychiatry is related to sexual disorders; disorders such as pedophilia and

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[1 Formatting this document for printing caused handwritten marginalia contained in the record version of the document to be omitted. At the top of the first page, the record copy contains the note "copy AUSA."]

sadomasochism. As a consequence of my work in that area, I have served as an invited member of the Subcommittee on the Paraphilias (in layman's terms, the sexual disorders) for the third revision of the *Diagnostic and Statistical Manual of Mental Disorders* (the so-called *DSM*).

I've also been an invited participant at a White House conference on Child Sexual Abuse; invited to address Subcommittees of the United States Senate on that same topic, as well as on related issues; and invited to address Colleges of Judges in several states. I have served as a consultant to the Maryland Division of Corrections, and to the European Parliament. I have participated in a number of symposium sponsored by the Federal Bureau of Investigation, and the sexual disorders treatment program that I currently direct has been designated as a National Resource Site by the United States Department of Justice. For your convenience, I am enclosing a copy of my full professional vitae along with this letter.

[2] *Issues Considered*:

In evaluating Dr. Friedlander, I have attempted to address[2] the following three issues. (1) To what extent were his Internet "chats" about beating children a manifestation of (a) fantasy interest and role-playing, versus (b) an interest in actually consummating such real-life acts. (2) At his current age of 78, does Dr. Friedlander have a psychiatric disorder that might have predisposed, or driven, him to become sexual with a child? (3) Is it possible to conclude, with reasonable medical certainty, that Dr. Friedlander has

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[2 Marginalia omitted, *see* fn1: "Psychiatric disorder"]

had specific mental intent with respect to[3] the issue of becoming sexually involved with children?

In addressing these matters, it might first be noted that historically, the Internet has represented a relatively new development; a development that has become associated with both great benefit and great risks. There are at least three aspects associated with the Internet that can be particularly problematic from a psychiatric perspective. First, because of its easy accessibility, it is possible (sometimes perhaps too much so) for one to interact with strangers by simply "clicking" a couple of times on a mouse. Secondly, because of the illusion of privacy, certain ordinarily helpful social inhibitions may be absent—particularly as related to the issue of "anonymous" chat room conversation. Thirdly, interacting on the Internet can all too often blur the distinction between fantasy and reality—sometimes seeming more like a pretend game of dungeons and dragons, than like a real-life interaction with real-life consequences.

Brief History of Dr. Friedlander's Relevant Internet Chats:

Dr. Friedlander had been arrested on July 21, 2008 after having traveled to meet a man, who unbeknownst to him had been an undercover government agent. That agent had previously become understandably concerned after having repeatedly heard from Dr. Friedlander about his lengthy and disturbing history of sadistic sexual involvements, not only with his own son, but with a number of other children as well. These involvements had reportedly taken place over the course of many years, and, according to Dr.

[3 Marginalia omitted, *see* fn1: "704b!"]

Friedlander, some such activities had still been going on. At the time of his arrest, Dr. Friedlander had been traveling to meet with the agent in question, reportedly in order to continue to pursue his sadistic sexual involvements with that gentleman's children (i.e., with the agent's children). At the time of his arrest, Dr. Friedlander had been carrying with him in his car the very same paraphernalia (e.g., straps of various sorts) that he had previously used to beat his own child. However, though an insulin-dependent diabetic, reportedly he had not brought sufficient medication with him to allow for him to remain away from home for very long.

During previous Internet "chats" with the agent in question, amongst other things, Dr. Friedlander had informed him that his house had been one that had involved corporal punishment. He had additionally stated that he had used a strap on his son, having begun with a [3] belt at 8 years of age, and then with a razor strap by age 11. He had said that his friends had all raised their children the same way, while noting that he had beaten his son almost every day. Dr. Friedlander had stated that his son had sometimes received as many as 75 swats with a strap, and that he had given it to him, in his words, "as an adult too." Having stated that he does best with leather, he had added that he had rarely used his hands, and that if his son had used poor language, he had sometimes cracked him across the mouth. Dr. Friedlander had indicated that he had believed most in corporal punishment, but in humiliation as well. As his son had become older, he had become even tougher with him, stating that after the age of 12, he had become "really welted."

Of even more pressing concern, during an additional "chat," with the agent in question, Dr. Friedlander had stated that "I will keep my friend's two grandsons this weekend." In speaking about their grandfather, he had characterized him as someone who was demanding and strict, indicating that he had had permission to act similarly with the children. Specifically he had stated the he had had "permission for everything." Dr. Friedlander had also informed the undercover agent that the children in question were just 12 and 14 years of age. In spite of these disclosures, an immediate arrest had not been made at the time of those "chats."

When asked by the agent "Do you use any special confinement techniques when administering discipline," Dr. Friedlander had responded "in the basement and sometimes tied." He had also spoken about "a special room," and when asked by the agent "are your pupils required to wear any certain attire for their lessons," Dr. Friedlander had responded "they will be totally stripped."

In agreeing to meet with the undercover agent (a meeting that had ultimately resulted in his arrest), Dr. Friedlander had said that he would bring with him the razor straps "that I used on my boy often." He had also indicated that he had beaten him most on his butt and legs—and that the marks had not been noticed because he had been home-schooled. With respect to the marks from those beatings, he had explained "I left them right where they were—put oil and cream on them." He had also stated "I beat my son daily, hard and long," suggesting that he had beaten other boys as well.

When asked by the agent what he would be wanting to do when meeting with him, and with his group

of friends, Dr. Friedlander had stated that "Well, first I need to get to know them and what they usually do in their times together." He had then added that "I am a believer in marking kids. My son used to yell and cry, but (I) paid little attention." At one point when asked if he would be able to bring his friend's grandchildren to meet with the undercover agent, Dr. Friedlander had indicated that indeed he might be able to do so. He had also said in an Internet conversation dated June 18, 2008 with respect to a proposed meeting "I should be in the Tampa area on Sunday, July 6, if you would like to meet for lunch."

Relevance of the Above-Noted Assertions:

In my professional opinion, if the above-noted assertions had indeed turned out to be true, and not merely imagined fantasies, then Dr. Friedlander's stated intent about wanting to continue [4] such a pattern of dangerous criminal misconduct with the undercover agent's children would have attained an alarming degree of credence and concern. On the other hand, if his stated intent had been to merely extend a pattern of previously non-existent acts, then clearly that stated intent might need to be viewed quite differently.

Before attempting to ascertain the true nature of Dr. Friedlander's supposed prior sadistic sexualized acts with children, it might first be useful to make just a couple of other additional observations as well. For example, in an Internet message to Dr. Friedlander from "Jaxsnap" dated December 16, 2002, "Jaxsnap" had stated "Sounds like you have more than enough toys for this boy." He had also spoken about leather, razor straps, and wide belts "to take good care of this bare ass." In another instant message, "Jaxsnap" had stated "This boy does require proper training."

An Internet message to Dr. Friedlander from "Pimass" dated January 13, 2006 had stated "You sound very much like the type of father I need—someone who is stern but spanking for my benefit." Yet another Internet message to Dr. Friedlander from "Timotber" dated January 27, 2006 had stated "Do you prefer long or short trousers for your boy?" In speaking about a schoolboy haircut, he had asked "Would you take me to the barber or cut yourself?" In addition, some other Internet messages to Dr. Friedlander had had eroticized overtones.

In the course of evaluating Dr. Friedlander, it has become clear that virtually all of the above-noted conversations, including these most recently noted Internet messages, had been fantasy-based, rather than reality-based. That is, they had been either a figment of Dr. Friedlander's imagination, or a request to engage in fantasy role-playing behavior, rather than a factual recounting of actual events. For example, Dr. Friedlander had told the undercover agent that his house had been a corporal punishment one, and that he had used a razor strap on his son. Dr. Friedlander has never been married and he has had no children. His assertion that he had started beating his non-existent son at age 8 with a belt, and then by age 11 with a strap, is clearly little more than pure fantasy. The two grandchildren of a friend whom he had also reportedly beaten are apparently also non-existent, and there could clearly have been no beatings in his basement—as his Florida home does not have one.

In spite of the publicity that his arrest has generated, not a single child has ever come forward alleging either physical or sexual abuse by Dr. Friedlander, and there is no forensic evidence suggesting that he

has ever beaten a child; for instance, blood stains on the belts that he had used to repeatedly beat his non-existent son. "Jaxsnap" who had stated "Sounds like you have more than enough toys for this boy," and who had spoken about "razor straps and wide belts to take good care of this bare ass" is apparently a single elderly retired gentleman who resides in Cape Cod, Massachusetts. "Pimass" who had stated "You sound very much like the type of father I need—someone who is stern, but spanking for my own benefit" is reportedly actually an adult male in his mid-thirties. "Timotber," who had asked "Do you prefer long or short trousers for your boy" is apparently a 41 year old man who had also stated "I'd like to be between 8 and 14. What age would you prefer for your boy?" Clearly, those conversations had been about fantasy and role-playing, rather than about acts involving any real children.

[5] The best predictor of future behavior is past pattern. To the best of my knowledge and belief, Dr. Friedlander has never been either sexually or physically abusive towards a child. Instead, his Internet conversations about such activities would appear to have involved either pure fantasy, or some form of role-playing pretense. In my professional opinion, to conclude that in the light of day, never before having either sexually or physically abused a child, that Dr. Friedlander would have been prepared to actually to do so with the undercover agent's non-existent children, constitutes nothing more than pure (albeit understandable) speculation. Fantasizing over the Internet while home alone is one thing. In my professional opinion, actually abusing and hurting a child in a bright light of day, never previously having done so, is quite a different matter.

Does Dr. Friedlander Manifest a Psychiatric Disorder That Could Predispose Him to Become Sexual With a Child?

During the course of a number of Internet "chats," Dr. Friedlander had described the infliction of purposefully painful beatings to several children. In addition, some of those "chats" about such beatings had manifested sexual overtones. From a psychiatric perspective, such conversations raise the possibility that he might have some form of mental disorder; most specifically pedophilia, sexual sadism—or some combination of those two.

According to the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR), the primary diagnostic criteria for sexual sadism are as follows. (a) Over a period of at least 6 months, the person with sexual sadism experiences recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving acts (real, not simulated) in which the psychological or physical suffering (including humiliation) of the victim is sexually exciting to the person. (b) The person has acted on those sexual urges with a non-consenting person, or those sexual urges or fantasies cause marked distress or interpersonal difficulty.

It is important to note that the *DSM* has made a distinction between real and simulated acts for a very crucial reason. That is so because many persons who fantasize about, or even engage in role-playing simulations, are not driven to act in a way that would actually constitute a danger to a non-consenting person (including a child). To the best of my knowledge and belief, Dr. Friedlander has never engaged in a sexually sadistic act with any non-consenting person (which, by definition, would include a child), nor, in

spite of the current charges against him, has he ever made a proven attempt to do so. Thus, he does not meet the *DSM* diagnostic criteria for sexual sadism.

Persons experience a wide range of sexualized, and non-sexualized, fantasies, some of which may lead to either game-playing, or role-playing, over the Internet. Be that as it may, the existence of such fantasizing, and role playing, is by no means inevitably linked to an urge to engage in similar real-life activities. For example, some women fantasize (and even role-play with their partners) the act of being raped. However, few, if any, would want to actually experience the real-life trauma of such an event.

[6] Many persons engage in Internet activities that involve the fantasized slaying of others. Most have no real-life interest whatsoever in actually taking a human life. Most persons who are fascinated by the horror stories of a populist author such as Stephen King have no real-life interest in actually inflicting, or experiencing, such horrors themselves.

Many years ago, an author named Alex Comfort wrote a book entitled "The Joy of Sex." That book, which quickly became a best seller, had, in part, depicted both women and men bound up during sexual activities. Although any number of couples have reportedly role-played similar scenarios, there is little reason to believe that the overwhelming majority of such participants have ever experienced a desire to become either the victim or perpetrator of a real-life sexual assault.

In my professional opinion, arguably Dr. Friedlander may have experienced some sort of vicarious excitement by engaging in what were clearly no more than "fantasy conversations" about having beaten his own

non-existent son, and other children as well. Indeed, he may have also experienced some sort of vicarious excitement during his Internet "chats" with the undercover agent in question. Be that as it may, it has now become quite clear at this point in time, that it would be foolhardy to conclude that Dr. Friedlander had repeatedly been beating his own non-existent son, and the sons of others, for the purpose of his own sexual gratification. Given what we now know, would it not be equally foolhardy to conclude that his discussions about what he would have done with the undercover agent's non-existent children had somehow, in his mind, been more about reality than fantasy?

Dr. Friedlander has told me that in spite of his Internet comments to the undercover agent in question, that his expectation on the day of his arrest had been to have a meal at a Cracker Barrel Restaurant. He had hoped to do so with a man (the agent in question) with whom he had believed he shared common fantasy interests. It is my professional opinion that he had been quite lonely at that time, and that he had been looking for an affiliation with someone with whom he had been sharing, what he had believed, had been common fantasies over the Internet.

I have taken note of the fact [that] Dr. Friedlander did not seem to have a clear understanding about his own motivations during the police interrogation that took place on the date of his arrest. Nevertheless, that interrogation, during which he had waived his Miranda rights, in my professional opinion, did not provide any additional evidence to suggest a diagnosis of sexual sadism. If anything, during that interrogation, he had spoken about thoughts of children doing something to him, rather than of he himself actually inflicting pain upon a child. Once again, in

my professional opinion, based upon the information that I have thus far reviewed, in spite of his active fantasy life, his Internet persona, and his interest in role-playing, Dr. Friedlander is not a sexual sadist, and he is not a dangerous man.

Does Dr. Friedlander Have Pedophilia?

According to *DSM-IV-TR*, a person with pedophilia: (a) over a period of at least 6 months, experiences recurrent, intense, sexually arousing fantasies, sexual urges or behaviors involving [7] sexual activity with a prepubescent child, or children (generally age 13 years or younger), and (b) that person has acted on these sexual urges, or these sexual urges or fantasies cause marked distress or interpersonal difficulties.

Having confiscated Dr. Friedlander's computers, and analyzed them forensically, the government now has a great deal of relevant information regarding his interests and actions. To the best of my knowledge and belief, no evidence has been found to suggest that Dr. Friedlander has ever actually had sex with a child. Certainly, he has never been sexual with his own nonexistent son. No child pornography has been found on his computers, and to the best of my knowledge and belief, he has never knowingly entered into Internet conversations with anyone under the age of 18 in order to seek out a sexual liaison. There is no evidence that he has ever produced, sold, solicited, or exchanged child pornography. It is the case that he has shared fantasies over the Internet, some of which may have had pedophilic overtones. He has also expressed an interest in role-playing activities that have involved an adult consenting male (apparently sometimes himself) pretending to be a young child who is being whipped by his own older father.

In spite of these sorts of fantasies, pretend persona, and role-playing behaviors, I have found no evidence that would enable me to conclude that Dr. Friedlander satisfies the *DSM-IV-TR* diagnostic criteria for pedophilia. To the extent that that is so, he does not appear to have a psychiatric condition that would drive him to seek out a real-life sexual encounter with a child.

Is it Possible to Conclude, With Reasonable Medical Certainty, That Dr. Friedlander Has Ever Actually Intended to Become Sexually Involved With a Child?

Of course, almost anything is potentially possible. However, when it comes to the issue of Dr. Friedlander's mental intent, the relevant question is "what conclusion does the evidence support," and with what degree of confidence can any such conclusion be made?

Psychiatrically, I have found insufficient evidence to support a diagnosis of either pedophilia, or sexual sadism (except, perhaps, with the arguable qualifier "present in fantasy only"). Dr. Friedlander is certainly not in any way whatsoever sociopathic, or antisocial, in his mental or characterological makeup. To the contrary, the evidence would suggest that over the 78 years of his lifetime, he has led a productive, responsible, and caring, though sometimes lonely, lifestyle. He does not have a drug or alcohol problem that might disinhibit him, or compromise his judgment. With the advent of the Internet, at times he has (as have many others) expressed his sexuality and role-playing interests by means of fantasy "chats." When undercover agents had become aware of his expressed interests, understandably they had then acted in such a fashion as to try to protect the wellbeing of innocent children.

It has now become quite clear that Dr. Friedlander had [become] immersed in a world of Internet fantasy, and that his conversations about having whipped and beaten his own non-existent son, as well as the children of other non-existent persons, had simply been a product of such fantasizing.

[8] However, because the agent in question could not have known that initially, rightfully he had attempted to sustain Dr. Friedlander's desire to continue engaging in such conversations, and ultimately in arranging for an actual meeting to take place.

In my professional opinion, over time Dr. Friedlander had come to feel an emotional bond, and an affiliation with, the undercover agent with whom (from Dr. Friedlander's perspective) he had been sharing his fantasy interests. In order to ensure that the desired meeting with this other man would actually occur, Dr. Friedlander had felt the need to continue maintaining his fantasy persona. In my judgment, his descriptions about what he had intended to do with the agent's non-existent children had been no more about real-life intent than had been his descriptions about what he had already been doing with his own non-existent son. In point-of-fact, in order to try to ensure that he would be accepted as a "friend," he had even taken the time (with the agent's implicit encouragement) to bring with him the very same straps and whips with which to beat the agent's non-existent children that he had previously used to beat his own non-existent son. In my professional opinion, the totality of the available information suggests that all of Dr. Friedlander's discussions with the agent in question about beatings (both past and "intended") had been much more about fantasy than reality.

In my professional opinion, the just proposed explanation is by far the most likely accurate characterization of this entire unfortunate situation. Given all of the information currently available to me, at this time I have simply been unable to conclude with reasonable medical certainty (let alone, beyond a reasonable doubt), that Dr. Friedlander had had an actual mental intent (as opposed to a fantasy-only interest), with respect to engaging in potentially sexualized sadistic acts with the undercover agent's non-existent children.

I trust that this information will prove useful. Should you require any additional information from me at this time, please do not hesitate to let me know. Thank you very much.

Sincerely,

/s/ Fred Berlin
Fred S. Berlin, M.D., Ph.D.

Associate Professor, The Johns Hopkins University School of Medicine
Founder, The Johns Hopkins Sexual Disorders Clinic
Director, National Institute for the Study, Prevention and Treatment of Sexual Trauma

Copy: File
Enclosure: Dr. Berlin's vitae